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SUPREME COURT, U.S.

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Supreme Court of the United States

OCTOBER TERM, 1952

No. 670-32

CLYDE BROWN, PETITIONER,

vs.

ROBERT A. ALLEN, WARDEN, CENTRAL PRISON  
OF THE STATE OF NORTH CAROLINA, RALEIGH,  
NORTH CAROLINA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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PETITION FOR CERTIORARI FILED JANUARY 31, 1952

CERTIORARI GRANTED MARCH 24, 1952



# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 670

CLYDE BROWN, PETITIONER,

vs.

ROBERT A. ALLEN, WARDEN, CENTRAL PRISON  
OF THE STATE OF NORTH CAROLINA, RALEIGH,  
NORTH CAROLINA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
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**IN UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF NORTH CAROLINA**

CLYDE BROWN, *Petitioner*,

vs.

J. P. CRAWFORD, Warden, Central Prison of the State of  
North Carolina, Raleigh, North Carolina, Respondent.

PETITION FOR WRIT OF HABEAS CORPUS—Filed June 21, 1951

To the District Court of the United States for the Eastern  
District of North Carolina:

The petitioner, Clyde Brown, respectfully shows unto  
the Court:

1. That he is a citizen of the United States of America  
and of the State of North Carolina, and is a member of  
the Negro race.

2. That he is at the present time unjustly and unlawfully  
detained and imprisoned at the Central Prison of the State  
of North Carolina, in Raleigh, North Carolina, by virtue  
of a judgment and sentence of death by asphyxiation pro-  
nounced upon him by the Superior Court of Forsyth  
County, North Carolina on the 15th day of September, 1950,  
upon conviction of the crime of rape.

Petitioner avers that he is not guilty of the offense for  
which he was tried, convicted and is presently detained by  
the respondent in the death house of the Central Prison  
of the State of North Carolina awaiting the execution of  
sentence of death by asphyxiation on the 22nd day of June,  
1951, and that the said imprisonment, restraint, and sen-  
tence are illegal and void, in that during the trial of peti-  
tioner before the Superior Court of Forsyth County peti-  
tioner was denied equal protection of the laws and due  
process of law, in violation of the Fourteenth Amendment  
to the United States Constitution.

[f8. 1i] 3. That in order that this Court may fully ap-  
preciate the grounds for the instant petition, petitioner will  
set forth herein the circumstances leading up to the in-

stant petition and then will set forth the specific respect in which he alleges his rights under the Fourteenth Amendment have been so violated as to render his conviction and the judgment and sentence passed thereupon null and void.

Your petitioner Clyde Brown, an illiterate Negro of about twenty years of age, was tried and convicted in the Superior Court of Forsyth County, North Carolina, of assaulting and raping a young white girl named Betty Jane Clifton. The crime was allegedly committed on the 16th day of June, 1950, and the defendant was brought before the court for trial at the September Term, 1950, of the Forsyth County Superior Court. At the time of his arraignment, and before pleading to the bill of indictment and before the selection of the jury, petitioner entered a special appearance and made a motion to quash the bill of indictment (Record, p. 22), upon the ground that the grand jury returning the indictment against the defendant was unlawfully constituted, in violation of the rights of the defendant as guaranteed him under the Fifth and Fourteenth Amendments to the Constitution of the United States, in that the members of said grand jury were selected and drawn with a view and purpose of systematically limiting the representation thereon of persons of the Negro race, to which race petitioner belongs, with the result that petitioner and members of his race are unlawfully discriminated against. The issue raised by petitioner's said motion was tried upon evidence presented, and the trial judge thereafter entered an order denying said motion (Record, pp. 49-52). Thereafter, in amplification and extension of his motion to quash the bill of indictment, petitioner, at the termination of the trial (Record, pp. 205-208), made a motion in arrest of judgment in which he sought to re-assert and expand the basis of his previous motion. This last motion the trial court also denied (Record, p. 207).

During the course of petitioner's trial, over the timely objection of the defendant, the State was allowed to introduce into evidence statements of petitioner in the nature of confessions of commission of the alleged crime. (Record, pp. 94-133.) Petitioner contends that the statements sought to be introduced as confessions were inadmissible for that they were unlawfully obtained, in violation of the guar-



anties of the Fourteenth Amendment to the Constitution of the United States. Upon the trial of issues thus raised, the trial court likewise overruled the petitioner's objection. Thereafter, upon trial of petitioner before the jury, he was convicted of the capital crime of rape, without recommendation of mercy, and the sentence imposed upon him was that of death by asphyxiation. (Record, pp. 208-209.) This latter conviction and sentence have been upheld by the [fol. 1k] Supreme Court of North Carolina, in an opinion, filed on the 2nd day of February, 1951 (State v. Brown, 233 N. C. 202, 63 S. E. (2d) 99). Petitioner is presently incarcerated on death row in the State Prison of North Carolina.

The evidence adduced by the state during petitioner's trial discloses that on Friday, June 16, 1950, at or around noon-time, one Betty Jane Clifton, a 17 years old high school student, was cruelly beaten and assaulted in the radio shop operated by her father, Thomas E. Clifton, on West 7th Street, in the City of Winston-Salem, North Carolina, which she was tending in the absence of her father. The evidence discloses that Betty Jane Clifton was beaten about the head with a rifle butt, or some other blunt instrument; she was found in the shop in an unconscious condition and removed to a local hospital where she hovered between life and death for many days. The defendant Clyde Brown was seen in the vicinity of the radio shop close to the time of the happening of the alleged crime, and was later arrested and held for sometime for investigation in connection with the crime. Various angles of his alleged connection with the crime were run down by local police officers, and after several days of detention without formal charge, the petitioner allegedly confessed the commission of the crime. Upon these representations of the State, petitioner was determined by the jury's verdict to have been the perpetrator of the crime.

4. That upon the affirming by the Supreme Court of North Carolina of his conviction and sentence by the Superior Court of Forsyth County, petitioner applied to the Supreme Court of the United States for a writ of certiorari to review the decision of the Supreme Court of North Carolina. On the 28th day of May, 1951, the Supreme Court of the

United States denied petitioner's application for said writ with the following entry:

"The petition for writ of certiorari is denied.

Mr. Justice Black and Mr. Justice Douglas are of the opinion certiorari should be granted."

Petitioner now turns to the respect in which he claims that his conviction and the judgment and sentence passed thereupon are illegal, null and void.

Petitioner contends that in his trial he was denied equal protection of the laws by the arbitrary and discriminatory exclusion of Negroes from and the limitation of Negroes on grand and petit juries in Forsyth County, solely and wholly for reasons of race and color. Petitioner further contends that in his trial he was denied due process of law, in that during said trial the Trial Court admitted into evidence over petitioner's objection confessions allegedly made by petitioner, which were obtained under circumstances which, when laid beside the measurements long promulgated by the United States Supreme Court, made them constitutionally inadmissible. Such being the case, petitioner contends that his conviction, judgment and sentence are null and void and that, therefore, the imprisonment and restraint of petitioner, pursuant to said conviction, judgment [fol. 11] and sentence, is illegal.

Petitioner Has Been Deprived of the Equal Protection of the Law by the Discriminatory and Arbitrary Exclusion of Negroes From (Grand and/or) Petit Juries in Forsyth County, Solely for Reason of Race, Including the Grand Jury Which Indicted and the Petit Jury Which Convicted Petitioner

There is and can be no controversy with respect to the constitutional principal herein involved, as it is one that has long been established as the fundamental law. Consequently, the only issue that usually arises in this instance is whether or not the constitutional proscription involved has been disregarded. This Court is familiar with the statutes and procedure governing the selection of Grand and Petit Jurors in the State of North Carolina. Just about

two and one-half years ago this Court had occasion, in a *per curiam* opinion of one word, to reverse five convictions arising out of the State of North Carolina, on the grounds that Negroes had been systematically and arbitrarily excluded from grand and petit juries in Forsyth County, North Carolina, the very same county from which the instant proceeding comes. *Brunson v. North Carolina*, 333 U. S. 851; *Jones v. North Carolina*, *id.*; *James v. North Carolina*, *id.*; *King v. North Carolina*, *id.*; *Watkins v. North Carolina*, *id.* In each of the foregoing instances, Negroes were indicted by grand juries in Forsyth County on which there were no Negroes and under circumstances which revealed that for many years no Negroes had ever served on grand juries; also, in each instance, contrary to the instant situation, although Negroes were included on the convicting petit juries, the number of Negroes on such juries then and in the past years was disproportionately small to the number of Negroes residing in Forsyth County eligible for jury service. As has been hereinbefore set out, the instant proceeding arises out of the same county of the State of North Carolina as the *Brunson*, *Jones*, *James*, and *Watkins* cases, to wit, Forsyth County. It is the contention of petitioner that the situation which obtained at the time of his trial represented an attempt on the part of the jury commissioners of Forsyth County to give only token compliance to mandate of this Court as set out in the aforementioned cases; that is, instead of approaching the inclusion of qualified Negroes on grand and petit juries in Forsyth County as a matter of general and ordinary jury selection [fol. 1m] procedure, petitioner contends that the facts in evidence and the circumstances herein show that the said jury commissioners have studied and purposefully limited the number of Negroes on grand juries to no more than one or two at a given time (R. 36-37), and the number of Negroes called to serve on petit juries to no more than four or five (R. 40-42). This Court has stated, in *Cassell v. Texas*, 339 U. S. 282, 286:

"If . . . commissioners should limit proportionally the numbers of Negroes selected for grand jury service, such limitation would violate our Constitution."



And, at 287:

"Proportional racial limitation is therefore forbidden. An accused is entitled to have charges against him considered by a jury in the selection of which there has been neither inclusion nor exclusion because of race."

See also *Virginia v. Rives*, 100 U. S. 322, 323.

The United States Census for 1940 discloses that the total population of Forsyth County was, as of said census, 126,475, consisting of 41,152 Negroes and 85,323 whites, the per cent of Negroes being 32.5% of the total. This census further shows that the total number of persons in Forsyth County 21 years of age and over were 75,556, of which 25,057 are Negroes, or approximately one-third of the total. It is thus apparent from the record, and it is a fact, that the foregoing proportion of Negroes in Forsyth County has never been even remotely reflected in the proportion of Negroes who have served on juries in Forsyth County. While it is an accepted principal that proportional representation of Negroes or any other racial group on every jury is not required, *Cassell v. Texas*, *supra*, disproportional representation of Negroes on juries in a given community for a number of years, when considered in the light of the proportion of Negroes of the total population, is strong evidence of the violation of the rights claimed, and one would have to be unduly credulous to accept the argument that the inclusion of Negroes on jury panels in consistently and unvarying small numbers, such as one or two at a time, was solely the handiwork of chance. As this Court said in *Smith v. Texas*, 311 U. S. 128, 131:

"Chance and accident alone could hardly have brought about the listing for grand jury service of so few Negroes from among the thousands shown by the undisputed evidence to possess the legal qualifications for jury service."

[fol. 1n] Although, the statute of the State of North Carolina (Gen. Stats. of N. C. 1943, sec. 9-1) charges the commissioners of the several counties with the affirmative duty

of resorting to the tax records of their respective counties and other sources for the purpose of fairly apprising themselves of the persons who are eligible for jury duty, the record in this case shows that the jury commissioners of Forsyth County, without further inquiry or consideration (R. 30, 37, 43), accepted as the jury panel for the period during which petitioner was indicted and tried a list of 40,000 names taken from the county tax records for the year 1948, which was tendered to them for this purpose, (R. 30, 31, 43). At the same time, although the commissioners admittedly knowingly failed to resort to sources other than tax records to obtain the names of persons who were qualified for jury service, although the aforementioned statute provides for the same, they sought to justify the consistent paucity of Negroes on grand and petit juries in Forsyth County upon the ground that Negroes comprise only about 16% of the taxpayers in Forsyth County (R. 36, 48). And, even if such contention be conceded, it is an accepted and a recorded fact that representation of Negroes on juries in Forsyth County has never even approximated 16% of the persons called for jury service in said county. Irrespective of the decision of the state courts on the federal right which was set up and claimed, it is the province of this Court to inquire not merely whether it was denied in express terms, but also whether it was denied in substance and effect. *Norris v. Alabama*, 294 U. S. 587, 590. Accordingly, whether a state law prescribe or does not prescribe a mode of jury selection which is designed to bring about equal protection of the laws in the administration thereof, as required by the Fourteenth Amendment, if the administrative agency which is charged with the duty of selecting juries pursues a course either through design or ignorance, which in fact results in the arbitrary exclusion of members of a given race from such juries, an infraction of the Constitutional requirement thus results. *Neal v. Delaware*, 103 U. S. 370; *Cartes v. Texas*, 177 U. S. 442.

It appears as a matter of deduction from the record that no Negro served on the trial jury which convicted petitioner (R. 24), and it further appears from the record that only one Negro was on the indicting grand jury (R. 39), in con-

tinuing observance of what petitioner contends is a studied and purposeful program of limitation of the number of [fol. 10] Negroes on grand and petit juries in Forsyth County. It is unquestioned that indictment and conviction of a Negro by a grand and petit jury from which Negroes have been purposefully excluded solely for reasons for race deprives that defendant of equal protection of the laws. *Strauder v. West Virginia*, 100 U. S. 303; *Neal v. Delaware*, *supra*; *Bush v. Kentucky*, 107 U. S. 110; *Norris v. Alabama*, *supra*; *Hale v. Kentucky*, 303 U. S. 613; *Pierre v. Louisiana*, 306 U. S. 354; *Smith v. Texas*, *supra*; *Hull v. Texas*, 316 U. S. 400; *Patton v. Mississippi*, 332 U. S. 463; *Brunson et als v. North Carolina*, *supra*. Purposeful exclusion is shown even where some Negroes do serve as jurors if the proportion of Negroes on juries is infinitesimal in comparison with the proportion of Negroes in the community eligible to act as jurors. *Pierre v. Louisiana*, *supra*; *Smith v. Texas*, *supra*. The essential inquiry is not whether Negroes are proportionally represented on any one jury, but whether an historical pattern of Negro participation on juries demonstrates deliberate exclusion. *Patton v. Mississippi*, *supra*; *Atkins v. Texas*, 325 U. S. 398. It is submitted, therefore, that the facts in this case and the applicable law forcefully demonstrates that petitioner was denied equal protection of the laws in this instance and that the state courts committed error in denying his motion to quash the bill of indictment and the trial jury panel.

#### The Conviction of Petitioner Deprives Him of His Life and Liberty Without Due Process of Law in View of the Admission Into Evidence of His Alleged Confessions.

The alleged assault and rape of the prosecuting witness, Betty Jane Clifton, a young high school girl, occurred on June 16, 1950. The defendant, Clyde Brown was reported by witnesses for the state to have been seen in the vicinity of the radio shop in which the incident occurred at or around the time of its alleged occurrence (R. 82 et seq.). The petitioner was arrested without a warrant and held for questioning in connection with the crime at or around 12:30 a. m. on the morning of June 19th (R. 96). The undisputed evidence is that the defendant was held in



custody until the 24th day of June, 1950, before he was formally charged with the commission of the crime and was not given a preliminary hearing in connection therewith until the 7th day of July, 1950, more than 18 days after his apprehension. (R. 95 et seq.). It is also undisputed that during the time he was held in custody, the defendant was questioned repeatedly and persistently by police officers of the City of Winston-Salem in relays until they succeeded in obtaining from petitioner the sort of confession they desired (R. 95 et seq.). Although the officers contended that they warned petitioner of his rights, they made no effort to obtain counsel for petitioner until they had carried him through a searing inquisition and he had given them the incriminating statements.

General Statutes of North Carolina, 1943, Sec. 15-46 provides:

"Every person arrested without warrant shall be either immediately taken before some magistrate having jurisdiction to issue a warrant in the case, or else be committed to the county prison, and, as soon as may be, taken before such magistrate who, on proper proof, shall issue a warrant and thereon proceed to act as may be required by law."

Although specifically enjoined so to do by the foregoing statutory provision, as has been hereinbefore set out, the officers who took petitioner into custody held him from the 19th day of June until the 24th day of June, a period of 5 days, without formally charging him with crime, and from the 19th day of June until the 7th day of July, a period of about eighteen days, before granting him a preliminary hearing (R. 98, 99). It is thus apparent that incriminating statements were elicited, he was being detained in violation of the laws of the State of North Carolina.

While the officers who had petitioner in custody contended that they advised him of his right, including the right to consult with counsel, it is apparent from the record as aforesaid, that counsel was not made available to petitioner until after the incriminating statements had been made. In determining whether or not the warning allegedly given petitioner, even if it should be conceded

that such a warning was given, meets the requirements of due process, it is submitted that this Court should take into consideration as a part of the circumstances the lack of intelligence on the part of the defendant as will certainly be revealed from a careful perusal on the whole record. A bald statement by officers to one of petitioner's intelligence and background in a situation of this kind that he has certain rights, knowing that he is in no position to avail himself of such rights without the affirmative help of his admonishers; it is submitted, becomes a [fol. 1a] vain and useless act. Petitioner does not contend that the incriminating statements were obtained through physical violence, but he does contend that they were induced by the coercive circumstances set out in the record, and as such are similarly inadmissible.

Since *Brown v. Mississippi*, 297 U. S. 278, it has been the undeviating practice of this Court to reverse convictions after trials in which there was admitted into evidence confessions induced by physical and mental coercion. *Chambers v. Florida*, 309 U. S. 227; *Cantu v. Alabama*, 309 U. S. 629; *White v. Texas*, 309 U. S. 631; *id.*, 310 U. S. 530; *Lomax v. Texas*, 313 U. S. 544; *Pernon v. Alabama*, 313 U. S. 547; *Ward v. Texas*, 316 U. S. 547; *Ashcraft v. Tennessee*, 322 U. S. 143; *id.*, 327 U. S. 274; *Malinski v. New York*, 324 U. S. 401; *Haley v. Ohio*, 332 U. S. 596; *Lee v. Mississippi*, 332 U. S. 742; *Watts v. Indiana*, 338 U. S. 49; *Turner v. Pennsylvania*, 330 U. S. 62; *Harris v. South Carolina*, 338 U. S. 68. In view of the fact that it is apparent from the record that, aside from the alleged confessions, a conviction of petitioner would have to rest upon flimsy and doubtful circumstantial evidence, it is submitted that it is particularly appropriate for this Court to review the facts herein to determine independently whether they spell out the type and sort of coercion which the foregoing authorities have determined to be unlawful.

*Ward v. Texas*, 316 U. S. 547, 555, provides the point of departure for evaluating the undisputed and uncontradicted evidence which exists in this case, for in that case *Byrnes, J.* stated the applicable criteria:

"This Court has set aside convictions based upon confessions extorted from ignorant persons who have

been subjected to persistent and protracted questioning, or who have been threatened with mob violence, or who have been unlawfully held incommunicado without advice of friends or counsel, or who have been taken at night to lonely and isolated places for questioning. *Any of these grounds would be sufficient cause for reversal.*" (Emphasis added).

The youthful age of petitioner (*Chambers v. Florida, supra; Haley v. Ohio, supra*); his illiteracy (*Harris v. South Carolina, supra; White v. Texas, supra*); the brutality of the crime involved (*Chambers v. Florida, supra; Ward v. Texas, supra*); his detention without hearing or arraignment. (*Harris v. South Carolina, supra; Turner v. Pennsylvania, supra; Watts v. Indiana, supra; Haley v. Ohio, supra*), and without any communication with friends [fol. 1r] or counsel (*Harris v. South Carolina, supra; Ashcraft v. Tennessee, supra; White v. Texas, supra; Chambers v. Florida, supra*; and the harrowing questioning which led up to the alleged confessions, all combined to make those confessions tainted and constitutionally inadmissible.

It is well settled that even where proof apart from a confession in evidence might be deemed sufficient to found a conviction, although, as aforesaid, such is not the case here; such proof will not influence the necessity for reversing a judgment of conviction where the confession was involuntary or coerced. *Haley v. Ohio, supra*, at 599; *Malinski v. New York, supra*, at 404.

It is submitted, therefore, that the state courts erred in admitting said confessions in evidence.

5. That, as aforesaid, the petitioner has exhausted all of his state remedies, including a petition for a writ of certiorari to the United States Supreme Court, and petitioner is, therefore, remediless save in this Court and by this procedure.

6. That no previous application has been made for the writ herein prayed for.

Wherefore, the premises considered, the petitioner prays:

(1) That a writ of habeas corpus directed to the said respondent, J. P. Crawford, may issue in his behalf so that petitioner may be brought forthwith before this Court;

(2) That said respondent be required to appear and answer the allegations of this petition;

(3) That following a full and complete hearing this Court relieve petitioner of said unlawful detention, imprisonment and sentence of death;

(4) That this Court issue forthwith an injunction specifically enjoining and restraining the respondent, J. P. Crawford, and his agents, officers and/or employees from putting into execution any sentence or judgment now standing against, or that has been imposed upon, this petitioner, in particular, in putting it to execution on the 22nd day of June, 1951, or at any other time, the death penalty presently pending against petitioner, until such time as he and/or they shall have received direction and instruction in the [fols. 1s-1u] premises from this Court, and

(5) For such other and further relief as to this Court may seem just and proper under the circumstances.

Clyde Brown, Petitioner,

*Duly sworn to by Clyde Brown. Jurat omitted in printing:*

[fol. 1v] [File endorsement omitted.]

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT  
OF NORTH CAROLINA

[Title omitted]

ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS—Filed  
July 2, 1951

The Petitioner, J. P. Crawford, Warden of the Central Prison of the State of North Carolina, answering the petition for writ of habeas corpus heretofore filed in this proceeding by the Petitioner, for his answer says:

1. The allegations contained in Paragraph 1 are admitted.

2. Answering the allegations contained in Paragraph 2, it is admitted that the Petitioner is confined in the Central Prison of the State of North Carolina awaiting



execution under a judgment or sentence of death pronounced upon him in the Superior Court of Forsyth County for the capital crime of rape; that except as herein admitted, the allegations contained in Paragraph 2 are untrue and are, therefore, denied.

3. Answering the allegations contained in Paragraph 3, the Respondent alleges that the Petitioner, Clyde Brown, was convicted in the Superior Court of Forsyth County at the September, 1950, Term of the crime of rape; that by virtue of a judgment and sentence of death, the Petitioner was committed to the Central Prison of the State of North Carolina for the purpose of carrying out said sentence of death; the Petitioner was duly, regularly and lawfully convicted of a capital offense in a Superior Court of the State of North Carolina having jurisdiction over person of Petitioner and of the offense with which he was charged in the bill of indictment; it is admitted that the Petitioner, during the progress of the trial in the Superior Court of Forsyth County, made certain motions as are shown in the record of said trial and that the Petitioner made certain objections to the admission of evidence as are shown in the record of said trial in the Superior Court of Forsyth County; it is further admitted that the Petitioner appealed to the Supreme Court of North Carolina and that the judgment of death of the Superior Court of Forsyth County was affirmed by the Supreme Court of North Carolina as shown by the opinion of said Court; that except as herein admitted and as may be hereinafter admitted in the Respondent's further answer to this petition, the allegations contained in Paragraph 3 are untrue and are, therefore, denied.

4. Answering the allegations contained in Paragraph 4, it is admitted that the Petitioner applied to the Supreme Court of the United States for a writ of certiorari to review the decision of the Supreme Court of North Carolina and that Petitioner's application to the Supreme Court of the United States was denied by that Court; that except as herein admitted, the allegations contained in Paragraph 4 are untrue and are, therefore, denied.

5. The allegations contained in Paragraph 5 are untrue and are, therefore, denied.

6. The allegations contained in Paragraph 6 are untrue and are, therefore, denied.

Further answering said petition for the purpose of the dismissal of same, by way of showing cause why the same should not be granted, and by way of plea in bar of the relief sought in said petition, Respondent, J. P. Crawford, Warden of the Central Prison of the State of North Carolina, says and alleges:

1. That the Petitioner, Clyde Brown, was duly indicted on a bill of indictment returned by a Grand Jury of the Superior Court of Forsyth County of the crime of rape, it being alleged in said bill of indictment that the Petitioner raped one Betty Jane Clifton, a high school girl in the eleventh grade, residing in the City of Winston-Salem; that as the Respondent is informed and believes, the Petitioner not only raped this young high school girl who was working in her father's radio shop on the date the crime was committed; but, in addition, the Petitioner cruelly beat [fol. 1x] and maltreated said Betty Jane Clifton, the victim of his assault, in a cruel and fiendish manner and as a result, this high school girl, Betty Jane Clifton, was taken to a hospital in the City of Winston-Salem where she remained unconscious and hovered between life and death for many days; that the Petitioner was duly tried in the Superior Court of Forsyth County, which said Court had jurisdiction over the person of the Petitioner and over the offense charged in the bill of indictment, and the Petitioner was duly convicted by a jury of the Superior Court of Forsyth County, and sentence of death was entered against the Petitioner as required by the laws of the State of North Carolina; that Petitioner was convicted in said Superior Court after a regular, proper, lawful and constitutional trial in a Court which at all times had jurisdiction over the person of the Petitioner and of the offense charged, and no constitutional rights of the Petitioner were violated, and said Court at all times retained jurisdiction over the Petitioner and the offense charged and never at any time lost such jurisdiction; that in the organization, selection and constitution of the Grand Jury which indicted the Petitioner and the petit jury which

tried the Petitioner, no violations of the Fourteenth Amendment were committed, and in the admission into evidence of any confessions or admissions of the Petitioner, no violations of the Fourteenth Amendment or any constitutional rights of the Petitioner were committed; that the trial Judge duly passed upon the question as to whether or not persons of the Petitioner's race had been arbitrarily and systematically excluded from Grand Jury service, as well as from service on the petit jury or trial jury, and said question was determined adversely to the Petitioner; that the trial Judge duly passed upon the question, during progress of the trial, as to whether certain admissions or confessions made by the Petitioner had been extorted from the Petitioner by means of physical violence, threats, coercion or any other unconstitutional method and means; that said question was determined by the trial Court according to the lawful method and practice provided by the State of North Carolina for the determination of such [fol. 1y] questions, and the trial Court found, after a fair and impartial investigation, that said admissions or confessions on the part of the Petitioner should be admitted as evidence, and the Respondent alleges that no constitutional rights of the Petitioner were in any respect violated by the action of the trial Court and that the trial Court never lost jurisdiction of the cause and that said Court had the legal and constitutional power to pass sentence or enter judgment of death against the Petitioner, and it is further alleged that such judgment or sentence is in all respects valid, constitutional, legal and enforceable; that all of the record and proceedings, including the evidence elicited in said trial in the Superior Court of Forsyth County, is hereby referred to and made a part of this answer and further answer to the same extent as if the same were fully copied herein and set forth and a properly authenticated copy of said record, trial, motions, judgment and evidence will be offered in evidence on behalf of the Respondent in this proceeding.

2. That the Petitioner duly perfected an appeal from said judgment to the Supreme Court of North Carolina, and said Supreme Court passed upon all constitutional questions about which the Petitioner is now complaining

in his petition for writ of habeas corpus, and the said Supreme Court of North Carolina found that the Petitioner's trial had been valid, legal and proper and affirmed the judgment of death heretofore entered by the Superior Court of Forsyth County against the Petitioner; that said appeal and all the proceedings in the Supreme Court of North Carolina, including the opinion of said Supreme Court as officially reported in the case of State v. Brown, 233 N. C. 202, 63 S. E. (2d) 99, are hereby referred to and made a part of this answer and further answer as if fully copied herein and set forth, and a duly authenticated copy of all proceedings in the Supreme Court of North Carolina as a result of the Petitioner's appeal in said case will be offered in evidence by Respondent on the hearing of this proceeding.

3. That thereafter the Petitioner applied to the Supreme Court of the United States for a writ of certiorari and [fol. 1z] filed in said Court a petition for a writ of certiorari, with supporting brief and other necessary papers; that the Respondent, State of North Carolina, duly filed in the Supreme Court of the United States its brief opposing the granting of a writ of certiorari and requesting a dismissal of said application; that the Supreme Court of the United States denied Petitioner's application for certiorari on the 28th day of May, 1951; that said petition for certiorari so filed by the Petitioner, his supporting brief, the brief of the Respondent, State of North Carolina, filed in opposition to the Petitioner's application and all the record and papers in connection with said Petitioner's application for a writ of certiorari so filed in the Supreme Court of the United States are hereby referred to and made a part of this answer and further answer as if herein copied and set forth, and a duly authenticated copy of all said proceedings pertaining to Petitioner's application for certiorari so made in the Supreme Court of the United States will be offered in evidence by the Respondent upon the hearing of this proceeding.

Wherefore, Respondent prays the Court:

1. That the Petition for a writ of habeas corpus heretofore filed in this cause be dismissed.



2. That any writ of habeas corpus that may have been issued or may issue or that may be issued in this cause be denied, dismissed and discharged.

3. That the order or injunction heretofore issued restraining Respondent and putting into effect the judgment or commitment under which the Respondent has custody of and detains the Petitioner be dismissed.

4. That the judgment and commitment under which Respondent holds Petitioner and under which he detains and has custody of Petitioner be declared to be a legal, valid and proper judgment and not subject to any attack in a habeas corpus proceeding.

5. That Respondent be authorized to carry out and execute said judgment in accordance with the laws and [fol. aa] statutes of the State of North Carolina.

6. For such other and further relief to which Respondent may be entitled, and which may be proper in this proceeding.

Harry McMullan, Attorney General of North Carolina, J. Ralph Moody, Assistant Attorney General, D. Brooks Peters, General Counsel of the State Highway and Public Works Commission, E. V. Broghan, Jr., Attorney and Member of Staff of State Highway and Public Works Commission, Attorneys for Respondent, J. P. Crawford, Warden of the Central Prison of the State of North Carolina, Raleigh, N. C.

[fols. 1bb-1ee] *Duly sworn to by J. P. Crawford. Jurat omitted in printing.*

*Proof service (omitted in printing).*

[fol. 1ff] **Exhibit 1 to Answer**—Filed July 5, 1951

[File endorsement omitted.]

NORTH CAROLINA, FORSYTH COUNTY, IN THE MUNICIPAL COURT  
OF THE CITY OF WINSTON-SALEM

STATE

v.

CLYDE BROWN, Col.

WARRANT FOR —

W. F. Reid, being duly sworn, deposes and says that Clyde Brown on or about the 16th day of June 1950, at and in the County aforesaid or within the corporate limits of the City of Winston-Salem, did unlawfully and wilfully, and feloniously rape and carnally know one Betty Jane Clifton, a female, forcibly and against the will of the said Betty Jane Clifton, against the statute in such cases made and provided and against the peace and dignity of the State and in violation of Section —, Chapter —.

W. F. Reid, Complainant.

Sworn to and subscribed before me this 24th day of June 1950. M. L. Ferrell, Clerk. By: O. R. Wilson, Deputy Clerk.

[fol. 2]

STATE OF NORTH CAROLINA

To the Chief of Police, City of Winston-Salem, or Other Lawful Officer of Forsyth County—Greetings:

For the causes stated in the above affidavit, you are hereby commanded forthwith to arrest Clyde Brown and him safely keep, so that you have him before the Municipal Court of the City of Winston-Salem, on the 26th day of June 1950, then and there to answer the above complaint, and to be dealt with as the law directs.

Given under my hand and seal this 24th day of June 1950.

M. L. Ferrell (Seal), Clerk Municipal Court, Winston-Salem. By: O. R. Wilson, Deputy Clerk.

## Endorsed:

The following persons: W. R. Burke, W. F. Reid, J. R. Wooten, W. C. Burton and H. C. Carter were recognized in the sum of \$25.00 each to appear as witnesses and testify in this action on behalf of the State at the next term of the Superior Court for the trial of criminal cases of said County, to be held on the 1st Monday in September 1950; I also send herewith the warrant and other papers in the above action and also state below the itemized bill of cost.

M. L. Ferrell, Clerk.

State v. Clyde Brown, Col., 1318 Wilson St. Warrant for—Rape. Issued 24th day of June 1950.

Summons as Witnesses: Betty Jane Clifton, 1046 Manly; Dr. Harry W. Goswick, City Hosp., Capt. W. R. Burke, W. F. Reid, John R. Wooten, W. C. Burton and H. C. Carter. [fol. 3] Rec'd 24 day of June 1950. Exec'd 24 day of June 1950. Ex. by Officer W. F. Reid.

IN THE MUNICIPAL COURT OF THE CITY OF WINSTON-SALEM  
JUDGMENT

Upon the trial of this case the defendant is—

Defendant waives preliminary examination and bound over to Sep. 3, 1950 Term Superior Court of Forsyth County. Bond —\$— Without Bond. Com: to jail.

This 7th day of July 1950.

M. L. Ferrell, Clerk.

IN SUPERIOR COURT OF FORSYTH COUNTY

ORGANIZATION OF COURT

July 3, 1950.

Be it remembered that a Forsyth County Superior Court is begun and being held at the Courthouse in Winston-Salem, N. C. on the 3rd day of July 1950, for the trial of criminal cases or civil cases, or both.

Hon. Dan K. Moore, Regular Judge, present and presiding.

Hon. Walter E. Johnston, Jr., Solicitor for the Eleventh Judicial District, present and prosecuting the criminal docket for this Court.

Upon the opening of Court today it is ordered that Court take a recess until 10 o'clock A. M. Wednesday, July 5, 1950.

Dan K. Moore, Judge Presiding.

Clerk: H. W. Floyd.

[fol. 4]

Wednesday, July 5, 1950.

Court opens pursuant to an order of recess on Monday, July 3, 1950.

Then comes Honorable E. G. Shore, Sheriff of Forsyth County, and in obedience to a venire to him directed by the Board of County Commissioners returns into open Court the following good and lawful persons summoned by him to serve as jurors, this the first week of this term of the Court, to wit, viz: Ira R. Fulton and others (naming them).

For reasons satisfactory to the Court the following good and lawful persons are excused from serving as jurors this the first week of this term of the Court, to wit, viz: John E. Davis, Mrs. J. H. Worrell and John Henry Conrad.

The names of the jurors were then placed in a hat and a child under the age of ten (10) years being present in open Court, the following good and lawful persons were drawn, chosen, sworn and charged to serve as Grand Jurors for the term of six (6) months, to wit, viz: G. Ivan Palmgren and others (naming them).

G. Ivan Palmgren is chosen and sworn to serve as Foreman of the Grand Jury for the term of six (6) months, and J. Grady Conrad is chosen and sworn to serve as Assistant Foreman of the Grand Jury for the term of six (6) months.

Jack Gough is chosen and sworn to serve as Officer to wait upon the Grand Jury for the term of six (6) months.



[fols. 5-6] IN SUPERIOR COURT OF FORSYTH COUNTY

ORDER APPOINTING COUNSEL FOR DEFENDANT—July 10, 1950

It having come to the Court's attention that Clyde Brown is the defendant in the aforementioned cause wherein he is charged with the capital offense of rape for which the punishment may be death; that the defendant is unable to employ counsel and that counsel should be appointed by the Court to represent the defendant:

Now, therefore, it is ordered that under and by virtue of General Statutes 15-4 it is hereby Ordered that Hosea V. Price, Attorney, is appointed to represent Clyde Brown in the charge of rape lodged against him.

[fol. 7] IN SUPERIOR COURT OF FORSYTH COUNTY

PLEA—September 4, 1950

The defendant, Clyde Brown, being called, comes to the Bar of the Court in his own proper person and forthwith it being demanded of him how he will acquit himself of the premises of the indictment above-named, charged upon him, saith that he is Not Guilty thereof, and thereof for good or for evil he puts himself upon his God and Country.

In this cause a true bill of indictment is returned into open Court against the defendant Clyde Brown by the Grand Jury, as follows: G. Ivan Palmgren and others (naming them), good and lawful persons of Forsyth County, North Carolina, heretofore drawn, sworn and impaneled according to law and charged to inquire for the State of and concerning all crimes and offenses committed within the body of the said county. It is presented in manner [fol. 8] and form following, that is to say:

IN SUPERIOR COURT OF FORSYTH COUNTY

BILL OF INDICTMENT—September 4, 1950

The Jurors for the State upon their oath present, That Clyde Brown late of the County of Forsyth, on the 16 day of June, in the year of our Lord one thousand nine hun-

dred and 50, with force and arms, at and in the County aforesaid; unlawfully, wilfully, and feloniously did assault one Betty Jane Clifton, a female, and her the said Betty Jane Clifton, unlawfully, feloniously, by force and against her will did ravish and carnally know against the form of the statute in such case made and provided and against the peace and dignity of the State.

Signed/ Johnston, Solicitor.

On the back of which is marked: No. 7079. State v. Clyde Brown. Indictment Rape.

Witnesses: Betty Jane Clifton, Capt. W. R. Burke, X W. F. Reid, X H. C. Carter, and Dr. Harry W. Goswick, X John R. Wooten, W. C. Burton, X T. E. Clifton.

Those marked — sworn by the undersigned Foreman and examined before the Grand Jury, and this bill found;  
— A True Bill.

G. Ivan Palmgren, Foreman Grand Jury.

[fols. 9-10] IN SUPERIOR COURT OF FORSYTH COUNTY

# ORDER FOR SPECIAL VENIRE

To: Hon. E. G. Shore, High Sheriff of Forsyth County,  
Greeting:

Whereas, it has been found necessary to the end that a fair and impartial trial of the defendant, who stands charged with the crime of Rape, be had, that a special venire of sixty (60) persons be summoned to act as jurors, or so many of them as may be necessary so to do in the trial of said action;

Now, therefore, you are hereby commanded to summon such number of persons qualified to act as jurors from the body of said county, and to appear at the Courthouse in the City of Winston-Salem, County of Forsyth, State of North Carolina, at 10:00 o'clock A. M. on Tuesday, the 12th day of September, 1950, to the end that so many of them as may be chosen, sworn and impaneled shall act as jurors in said action.

~~Herein~~ fail not, and of this writ make due return.  
This the 8th day of Sept., 1950.

IN SUPERIOR COURT OF FORSYTH COUNTY

MINUTES OF MOTION TO QUASH

The defendant, Clyde Brown, comes into open Court in his own proper person and through his counsel, Hosea V. Price, moves to Quash the bill of indictment, returned by the Grand Jury of Forsyth County, charging the defendant with the capital crime of Rape. This motion is overruled by the Court in accordance with a finding of Facts hereafter appearing in this record.

[fol. 11] IN SUPERIOR COURT OF FORSYTH COUNTY

DRAWING OF JURORS—REGULAR AND SPECIAL—September 12, 1950.

Court opens pursuant to an order of recess on yesterday. At the opening of Court today the cases of State v. Edward H. Pugh, State v. James W. Burnett, and State v. Stewart Hiatt are still pending.

The defendant, Clyde Brown, again comes into open Court in his own proper person, and in the custody of the Sheriff of Forsyth County.

Then comes Honorable E. G. Shore, Sheriff of Forsyth County, and returns into open Court with the special venire to him directed by the Court, the following good and lawful persons, same being freeholders, summoned by him to attend at the Courthouse in Winston-Salem, N. C., on the 12th day of September, 1950, at 10:00 o'clock A. M., to wit, viz: Dewey Carroll and others (naming them).

The defendant, Clyde Brown, being at the Bar of the Court in his own proper person and in the custody of the Sheriff of Forsyth County; the prisoner was duly warned of his rights by the Solicitor prior to the names of the regular jurors being placed in the hat. The names of the regu-

lar jurors were then placed in the hat, and a child under the age of ten years, J. M. Doub, III, being present in open court, the following jurors were drawn, accepted by the State and the defendant and sworn, the same being regular jurors, to wit, viz: Jesse Styers, Robert G. Brown, C. E. [fol. 12-13] Angel, E. S. Nash, William T. Mowery, W. S. Parks, Joseph H. Mickey and L. K. Mowery.

After the panel of regular jurors was exhausted, the prisoner was again duly warned of his rights by the Solicitor and the names of the special venire were then called and the names placed in the hat, and a child under the age of ten years, J. M. Doub, III, being present in open court, the following jurors were drawn, accepted by the State and the defendant, and sworn, the same being special veniremen, to wit, viz: D. C. Smith, H. M. Kimel, R. L. Parr, and K. L. Smith.

Whereupon the prisoner, Clyde Brown, being at the Bar of the Court in his own proper person and in the custody of the Sheriff of Forsyth County, the foregoing good and lawful persons having heretofore been drawn, chosen and sworn, were duly and lawfully impaneled to try this case, as provided by law, at or about the hour of 5:20 o'clock P. M. on the 12th day of September, 1950.

After twelve jurors had been drawn, chosen, sworn and impaneled, it is ordered by the Court that a thirteenth or alternate juror be chosen in this case. Whereupon the defendant was again duly warned of his rights by the Solicitor, and a child under the age of ten years, J. M. Doub, III, being present in open court, the following juror, the same being the thirteenth or alternate juror, was drawn, accepted by the State and the defendant and sworn, the same being a special venireman, to wit, viz: C. L. Barkley.

Whereupon the prisoner, Clyde Brown, being at the Bar of the Court in his own proper person and in the custody of the Sheriff of Forsyth County, the foregoing good and lawful persons having heretofore been drawn, chosen and sworn, were duly and lawfully impaneled to try this case, as provided by law, at or about the hour of 5:30 o'clock P. M. on the 12th day of Sept., 1950.



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[fol. 14] IN SUPERIOR COURT OF FORSYTH COUNTY

ORDER FOR ALTERNATE JUROR

It appearing to the Court that the defendant is on trial for a capital offense and the trial is likely to be protracted; Therefore, after the jury had been duly impaneled and sworn, the Court directed that an alternate juror be selected, as provided for by law.

This 13 day of September, 1950.

[fols. 15-20] IN SUPERIOR COURT OF FORSYTH COUNTY

VERDICT—September 14, 1950

At or about the hour of 8:55 o'clock P. M. on the 14th day of September, 1950, the aforementioned good and lawful persons heretofore sworn and impaneled to try this case make known to the Sheriff that they are agreed upon a verdict in this case. Whereupon the Sheriff brought the jury into open Court and the following inquiries were made:

The Clerk: Gentlemen, answer to your names. Jesse Styers, Robert G. Bowen, C. E. Angel, E. S. Nash, William T. Mowery, W. S. Parks, Joseph H. Mickey, L. K. Mowery, D. C. Smith, H. M. Kinsel, R. L. Parr and K. L. Smith. To which all answered, Present.

The Clerk: Gentlemen, have you all agreed?

Answer: Yes.

The Clerk: Who shall speak for you?

Answer: D. C. Smith.

The Clerk: Prisoner, stand up. Jurors look upon the prisoner and hearken to his cause. What say you for your verdict? Is he guilty of the Rape and felony whereof he stands indicated or not guilty?

Answer: Guilty, as charged in the bill of indictment.

The Clerk: So say you all, gentlemen?

Answer: Yes.

Upon the coming in of the verdict in this case the Court ordered that the jury be polled. Whereupon the Clerk called the names of each of the jurors and inquired of each juror if his verdict in this case is guilty and does he still

assent thereto, to which each juror answered "yes." At the close of Court today judgment has not been pronounced in this case.

[fol. 21] IN SUPERIOR COURT OF FORSYTH COUNTY

DEFENDANT'S STATEMENT OF CASE ON APPEAL

This was a criminal action tried before Honorable Dan K. Moore, Judge Presiding, at the September 4, 1950, Term of Forsyth Superior Court, and a jury. The de-  
[fol. 22] fendant appealed.

IN SUPERIOR COURT OF FORSYTH COUNTY

DEFENDANT'S EVIDENCE ON MOTION TO QUASH THE BILL OF  
INDICTMENT

STIPULATION

It is stipulated and agreed that the population statistics of the City of Winston-Salem and Forsyth County, according to the 1940 census and the 1950 census, are as follows: (See statistical chart marked Exhibit A):

[fol. 23] EXHIBIT A—CENSUS STATISTICS OF FORSYTH COUNTY 1940

	Total Popu- lation	Per Cent	Male	Female	Poll Tax List- ing	All Per- sons Over 21 Years
White	85,323	68.1	41,475	43,848		
Colored	41,152	31.9	19,356	21,796		
Male						35,572
Female						39,984
Total	126,475					
			1950			
White	100,434	68	*	*	20,120	
Colored	45,792	32	*	*	2,987	
Total	146,226					

\* These figures for 1950 census are not available.

Note: According to the 1940 census, the population for the City of Winston-Salem was 79,815; of said 79,815 persons, according to the 1940 census, 54.4 per cent was white and 45.1 per cent was Negro. According to the 1950 census, the population for Winston-Salem is 87,226.

[fol. 24] It is agreed between counsel representing the defendant, Clyde Brown, and the Solicitor for the Eleventh Judicial District, and said agreement was approved by Honorable Dan K. Moore, Judge Presiding at the September 4, 1950, Criminal Term of Forsyth County, North Carolina, that in the selection of the trial jury there were thirty-seven regular jurors called, of which at least eight were members of the Negro race, and there were twenty special veniremen called of which at least three were members of the Negro race. The Solicitor excused three prospective Negro jurors, two of whom were regular jurors of the female sex and one special venireman. All other prospective Negro jurors were excused by the Court for cause. When the panel of regular jurors had been exhausted, the defendant had seven challenges remaining and when the jury of twelve had been selected the defendant had one remaining challenge. There was no challenge from either the State or the defendant, to the thirteenth juror.

JOHN CLICK, first duly sworn, testified: My name is John Click. I am IBM Supervisor in the office of the Tax Supervisor of Forsyth County. In that capacity I have been requested by the Commissioners to furnish to the office of the Register of Deeds, from the tax records, a list of all people eligible for jury in Forsyth County. I furnish a list of all taxpayers in Forsyth County that are of age and residents. I determine that from my cards. That list is run on a tabulator, from the cards, in continuous form, the names of all the people and addresses, and the names on the list are furnished to the Commissioners for their approval. In making that list I have no knowledge of and make no determination of whether the prospective juror has or has not paid taxes for the previous year. They are qualified to my knowledge to serve on the juries by the reason of my coding. By my coding I pull out all juveniles, [fol. 25] all non-residents, all coding that is deceased, so those that I have are only those people that are residents and of age.

I make the list up once every two years and present it at the Commissioners' meeting the first week in June, and that is supposed to be a list of all the taxpayers, regardless of whether they are white or colored.

The scrolls in the tax office are separated as to white and colored. In making my list, I do not refer to books; I run from my cards. My cards are not separated as to white taxpayers and colored taxpayers; they are all together, white and colored, for each township in our whole county. They are alphabetically arranged. I do have a separation as to white and colored. On our machines, I feed in my cards. That machine is able to think for itself. It takes them all.

After I prepare the list, I turn it over to the County Commissioners and I have nothing further to do with it after that.

#### Cross-examination.

I am in charge of the IBM Department of the Tax Supervisor for the County of Forsyth, and in that capacity I put on an IBM card the name of each person who lists taxes, either by way of real property tax, personal prop-



erty tax, or poll tax. The only distinction with reference to any classification I make is that I give non-residents a particular dash on the card and I give children or persons under the age of 21 years a particular dash on the card.

When the time came to make up the list of taxpayers for Forsyth County from which I understood the jury list for the June and July meetings of the County Commissioners of 1949 would come, all of my cards were commingled, irrespective of race, white or colored, and they were placed in my machine, and the only distinction between any of the cards was with reference to the persons under 21 years of age and non-residents. There is a coding on the card [fol. 26] to indicate whether the taxpayer is a white person or a colored person. In running those cards through the machine, there is no distinction made whatever. They all go through, and the only thing taken out are the persons under 21 years of age and the non-residents.

#### Examination by the Court.

When I have completed my list, the list which I turn over to the Commissioners contains the names of all the taxpayers of Forsyth County with the exception of those under age and non-residents. Beside of the person's name on that list are two numbers, which numbers serve two purposes: 1. It tells the township of the individual, where he lives, resides; 2. It tells whether he is white or colored, because our tax books are set up that way.

#### Cross-examination continued.

When I presented the tax list to the County Commissioners last June, 1949, there was nothing on that tax list to indicate whether the persons who were listed there were colored or white. Mrs. Eunice Ayers, the Register of Deeds for Forsyth County and Clerk to the Board of County Commissioners for Forsyth County, requested me to make up this list and to assist her in preparing this list for the County Commissioners.

#### Re-direct examination.

I told his Honor that the list I presented to the County Commissioners bore two numbers, two code numbers, one

that would give the information as to what township the individual lived in, and the other to indicate as to whether the individual was white or colored, and I told the Solicitor that there was no indication on this list that was made up and presented to the County Commissioners in June, 1949, as to whether the individuals on that list were white or colored. I answered that question based on the fact that only the people, to my knowledge, that worked with the tax books, such as myself, would know, from those records, [fol. 27] whether they were white or colored. That was my reason for answering it. There is nothing on the face of the slip to indicate or show whether he is white or colored, that is, on this last list that I made up. There are those two ~~names~~ on this list, but nothing to indicate whether it is white or colored unless you were to know all of our particular townships and how they are set up. Those same code numbers are on this last list, this list that was presented in June, 1949, and those are the same two numbers to which you can refer and determine, if you have the information and if you know the code, whether this party is white or colored and what township he lives in, and those same code numbers were on this list that was presented to the County Commissioners in June, 1949, from which the present Grand Jury was later drawn.

The coding that I speak of is simply a coding that is worked out in the Tax Department for Forsyth County. The coding is published downstairs in the Tax Supervisor's office. There is nothing secret about it that I know of.

#### Re-cross examination.

Q. Mr. Click, why do you keep those code numbers that you have described on these tax records?

A. Why do we keep them, sir?

Q. Yes. Why do you put them on there?

Objection; overruled; and defendant, in apt time, excepted—Exception No. 1.

A. To indicate the township in which the individual lives.

I keep those code numbers on the tax records, as I have described, for no other purpose than the purpose of keeping the tax records straight. I do not have any knowledge

about what the law requires with reference to keeping the tax records in that fashion.

The only time I have been present at the drawing of a jury list was when I was a child, six, seven or eight years [fol. 28] old, at which time I did the drawing.

I did not exclude any name from the list I furnished to the County Commissioners at the request of Mrs. Eunice Ayers and assisted her in making, because of race or color or creed.

Q. Every name, excepting those of persons under the age of 21 years and persons who were non-residents, was included in that list *that list* any kind of taxes in Forsyth County?

A. They were all in there, sir.

Re-direct examination.

I have never made a notation of what percentage of the names on the list I presented to the County Commissioners is white and what percentage is colored. I have run this list only one time. I have no knowledge of what percentage of the list is white and what percentage of the list is colored.

The list I prepared was prepared from all the taxpayers or persons listing taxes, regardless of what kind of taxes, whether it was poll tax, personal property taxes or freehold, and I put all those names on the list except the non-residents and the ones under 21 years of age. I know nothing about the law in regard to the qualifications.

MRS. EUNICE AYERS, first duly sworn, testified: My name is Mrs. Eunice Ayers. I am the Register of Deeds of Forsyth County, and as Register of Deeds I also serve as Clerk of the Board of County Commissioners.

The list of taxpayers which Mr. Click testified is prepared every two years and handed over to the County Commissioners is presented to the County Commissioners in regular session; of course, I am present. I have nothing further to do with the list after it is presented to the Commissioners, except to go ahead with the procedure of presenting them in the box when the proper time comes.

[fol. 29] The names appearing on that list come out on long sheets, as many sheets as the number of names require, and then they must be cut apart, and put into a box, Box No. 1, first. Mr. Click cuts them apart, under my supervision. Mr. Click does that after he presents the list to the County Commissioners. The names are cut apart, in uniform size.

After the names are cut apart and made of uniform size, they are placed in Box No. 1, and the jury is drawn at the regular sessions of the County Commissioners, and I am not present at the jury drawings. I am present at the June meeting and the July meeting. At the June meeting the list is presented and then the old names are taken out of the box, and all the names are put into Box No. 1, the first side of the box. I am present at that time. Later, when they are drawn, they are drawn from No. 1 and placed in No. 2. That is our six months' drawing.

Q. I think we are a little confused.

Q. You mean six months' drawing? No. That is when the box is prepared for drawings.

Q. That is June when—

A. Every two years.

Q. Every two years?

A. Yes.

The list from which the present Grand Jury was drawn was made up in June, 1949. I present that list to the County Commissioners. We place them in the box right then and there. In June the list is presented to the County Commissioners and, if I recall correctly, it is at the July meeting when they are placed in. I will have to have my memory refreshed from the minutes; but the list is presented in June and then the box is cleared of the old names and the new list put into Section #1 of the box at the July meeting. I do that work myself with the assistance of Mr. Click and whoever else happens to be there. At that particular time, Mr. Nat Crews, County Attorney, and I think Mr. Jack Gough was present, and Mr. Click, Mr. Craft, and Mr. Simpson, I believe, of the County Commissioners. [fol. 30] There might have been others; I recall those. Possibly Mr. Hanes was there. The minutes will show. I



don't know what the custom has been. That is the only time I have had anything to do. That was my first time. Of course, I read the statute and felt that we were following that as good as possible.

I have not been present at a drawing; merely in preparation of the jury box for drawings. In preparing that jury box, I prepared it with respect to the tax list of all tax listers. Approximately 40,000 persons or prospective jurors were concerned when I prepared the list. The pieces of paper that I handled had no indication whatsoever, that I could determine, as to whether they were white or colored. I could not have told you that the numbers were there. Mr. Click testified that code numbers were there, but, frankly, I didn't know they were on there; that didn't make any impression; just the names.

#### Cross-examination.

I became Register of Deeds of Forsyth County and Clerk to the Board of County Commissioners on March 15, 1949. The first and only jury box that has been organized since I became Clerk to the Board was the one that was organized at the June, 1949, and July, 1949, meetings. I requested Mr. Click to assist me in preparing a list of all the taxpayers of Forsyth County in making up this box, with the permission of the County Commissioners. Mr. Click and I finished preparing it sometime before the June 1949 meeting, and at the June 1949 meeting I presented it to the Board of County Commissioners. After that meeting it was turned back to me, when I further prepared the clipping of the names apart. They were all clipped apart in a uniform fashion. They were all printed on the list in a uniform fashion. As far as I am concerned, there is nothing on there but names and addresses of the persons.

When the Commissioners met in July, I was present, and Mr. Simpson and Mr. Craft, Commissioners, were present [fol. 31] ent, and Mr. Crews and Mr. Gough were present, as well as I recall. At that time there were just three Commissioners, and Mr. Craft and Mr. Simpson were both present. Mr. Crews was present. The box was made up at that time. The about 40,000 names on the list I have

described as having been furnished to the Commissioners at the June 1949 meeting were all the names that were placed in the box. There was no name whatsoever excluded from that box from that list.

#### Examination by the court.

The June and July 1949 meetings were for the purpose of purging the box. I took out all names that had been in there prior to that time and destroyed those names, and in lieu of those names, as a new jury box, I put in a list of all the taxpayers of Forsyth County, approximately 40,000 names, as furnished me by Mr. Click, and in putting in those names none were excluded for any reason. After that box was prepared for use it contained the names of all tax listers in Forsyth County, regardless of race. Those names were taken from the 1948 list, the list for the previous year.

#### Cross-examination continued.

That box that was prepared in July has been in my control since that time. The Sheriff has a key and the County Commissioners have a key. The box remains in my control except at the time when we all assemble and draw the jury list from time to time; we keep it in our vault. I am not present at the drawing of the jury.

#### Re-direct examination.

Since I am not there, I don't know who is usually present at the drawing of the jury.

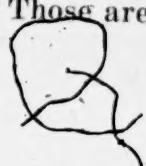
NAT S. CREWS, first duly sworn, testified: My name is Nat S. Crews. I am County Attorney for Forsyth County. As such, I attend each meeting of the County Board of [fol. 32] Commissioners, and when legal matters come before them relating to the drawing of juries, or any other matters that the Commissioners want information about, I attempt to assist them in any way I can.

I was present in June when the jury list was made up, the list from which this present jury, that is serving this term of Court, was drawn. At the June 6, 1949, meeting

of the Forsyth County Board of Commissioners, the Commissioners met in the Small Courtroom of the Courthouse at 10:00 o'clock, at which meeting I was present. The minutes of the meeting, in part, reveal that "there was laid before the Board of County Commissioners, in accordance with the provisions of Section 9, Subsection 1, as amended, of the General Statutes of North Carolina, the tax returns of Forsyth County for the preceding year, of 1948, there being present when this list was presented: Eunice Ayers, Register of Deeds and Clerk to the Board, Nat S. Crews, County Attorney, John Click, in charge of the IBM machines of Forsyth County," and the records reveal that Messrs. Roy W. Craft, Chairman, James G. Hanes and William B. Simpson, members of the Board, were present. "Mr. Click explained to the Board of Commissioners the manner in which this list was prepared by the IBM machines, and stated that in the preparation of this list there was no discrimination whatsoever as to race, color, and so forth, Mr. Click stating the following: "The jury list which is being presented to the Board of Commissioners at the June 6, 1949, meeting was prepared from the 1948 IBM card file and represents the tax returns of Forsyth County for the year 1948. All non-residents, persons under 21 years of age, and other ineligible for jury duty were eliminated without prejudice on the IBM machine. The card used in selecting the jury list which is being presented has produced a complete list of eligible persons without discrimination whatsoever, and every effort has been made to strictly comply with the provisions of Section 9, Subsection 1 of the General Statutes of North Carolina, as [fol. 33] amended." And, further, the minutes show that "Nat S. Crews, County Attorney, stated that Harry McMullan, Attorney General, had advised him that the 1947 amendment, H. B. No. 87 of the 1947 North Carolina Session, authorized, but did not require, the boards of county commissioners to use other sources of information in selecting the jurors than the tax lists." Then there is a reference to the date of Mr. McMullan's letter to me and where it is filed in my office. "The Board of Commissioners were of the opinion and so ordered that the list be confined to the tax returns; that to use other sources of informa-

tion, would cause a duplication of names in the jury list and also would result in placing in the jury box many names of persons who were not qualified to serve, etc. The Board of Commissioners, upon examination of the jury list containing the tax returns of 1948 as above explained, ordered that the entire list be used so that there will be no discrimination as to persons and ordered that said list be the jury list of Forsyth County for the purposes set forth in the General Statutes of North Carolina relating to the same. The Board of Commissioners then ordered the Clerk to the Board to preserve said list of names and to be prepared to present same to the Board of Commissioners at their July 1949 meeting in accordance with the provisions of Section 9, Subsection 2 of the General Statutes of North Carolina." These minutes are signed by R. W. Craft, Chairman, and Eunice Ayers, Clerk to the Board.

The next record of the meeting of the Commissioners was the Commissioners' meeting of July 11, 1949. The Board of Commissioners for the County of Forsyth met July 11, 1949, in the Small Courtroom of the Courthouse, being present, Messrs. R. W. Craft, Chairman, and W. B. Simpson, member. On page 373 of the minutes of the Board this appeared: "The Board of Commissioners having, at the June 6, 1949, meeting, in accordance with Section 9, Subsection 1, as amended, of the General Statutes of [fol. 34] North Carolina, selected the names of persons for jury duty and ordered that said list of names constitute the jury list of Forsyth County and preserve as such, and did cause the names on said jury list to be copied on small scrolls of paper and put into a box which is used for said purposes, and did, before placing said names in said box, take therefrom all names of persons from said box and did destroy same, all in accordance with Section 9, Subsection 2, of the General Statutes of North Carolina, as amended by H. B. No. 87 of the 1949 General Assembly, the names of said jurors on the new jury list, which appeared on small scrolls of paper of equal size, being placed in Division 1 of said jury box." And the minutes for this meeting are signed by R. W. Craft, Chairman, and Eunice Ayers, Clerk to the Board. Those are the minutes for the July 1949 meeting.





I was present at the June 5, 1950, meeting of the Board of Commissioners for the County of Forsyth. The Forsyth County Board of Commissioners met June 5, 1950, in the Small Courtroom of the Courthouse, there being present Messrs. R. W. Craft, James G. Hanes, and William B. Simpson. On page 431 of the minutes this appears: "A jury was drawn in accordance with the law made and provided for the following weeks of Superior Court. July 3rd, Criminal, sixty (60) names from which the Grand Jury is selected. July 10th, Criminal, forty-four (44) names. A list of the persons drawn is on file in the County Attorney's office, to which reference is hereby made." The names were drawn by a little boy who was brought to the Commissioners' meeting upon request of the Commissioners by one of the deputies sheriff. The little boy drew the names out of the box, drawing 60 names first, and then drawing 44 names, according to the record.

When the County Commissioners convene at their monthly meetings and the special meetings they transact the business of the County first, and then the drawing of the [fol. 35] jury usually takes place during the latter part of each meeting. The meetings take place as indicated here, in the Small Courtroom, and the jury box is opened to Division #1. The little boy stands on a chair or table, where he can reach it, and pulls the names out of the box. The three Commissioners sit behind two tables and they pass the names on down to my secretary, who writes the names on the jury orders. At the conclusion of the meeting the jury orders are signed by the Clerk to the Board and delivered to the Sheriff so the persons appearing thereon may be summoned for jury service. At that meeting and at that drawing there is no determination made as to the qualification of prospective jurors, to my knowledge.

I make no determination myself as to whether a person drawn from the box by the little boy is living or dead or a non-resident. If any determination is made it is made by the three Commissioners. The names are passed along before the two or three Commissioners, if three are present. The Commissioners have no discretion in the matter, except if they know of their own personal knowledge that

John Doe is dead or John Doe has moved out of the county, I think they are warranted in taking that name out.

On this occasion I don't recall that there was any occasion for leaving from that list any name. There is no procedure, to my knowledge, and I am present, to systematically eliminate persons of the Negro race. I was present at that drawing. On that occasion there was no determination made as to the qualification of any name drawn by the little boy, that I know of. All of the 60 and all of the 44 names that were drawn by the little boy were listed and accepted and handed over to the Sheriff's Department for summoning, to my personal knowledge. I will say that we transact a lot of business in three hours' time, and frequently I have to leave the courtroom and meet some delegation outside which has a road petition or something else they want brought to the attention of the Commission[fol. 36] sioners. I am not there every minute during the drawing of the jury by the little boy; I am there most of the time.

Sometimes I am up here in the courtroom when the Grand Jury is drawn. Of course that takes place before His Honor here in the courtroom. I am not required to be here, but I do come here on occasion. I don't believe I was here when the 18 names were drawn to make up and constitute the Grand Jury for the September 4th Criminal Term; I don't recall it; it made no impression on me. I believe if I had been here I'd recall it. I don't think I was present in Court.

Q. You said a moment ago, voluntarily, Mr. Crews, that at no time has there been—or something to that effect—that at no time has there been any effort made to eliminate persons of the Negro race when you are drawing the jurors. In line with that thought, Mr. Crews, would it strike you as odd that in the selection of the Grand Jury that there would always be, taking into consideration the population of Forsyth County as to Negro as well as white, that there would always be from one to two and no more Negroes appearing on the Grand Jury?

A. I think that is a conclusion. Whatever I'd say to you is a matter of opinion.

Q. In your opinion?

A. No, sir, that wouldn't make any great impression on me, for the simple reason that we don't know, as of today, how many persons whose names appear on the tax lists of Forsyth County are white or how many are colored. I mean, it would take some probably two or three days to do that. We do know that for 1948 the tax list, which is the foundation for this present Grand Jury, that the proportionate number or percentage of persons listing property for polls, it is about 85% or 84% white and only 16% colored. Those figures, Mr. Hinshaw, the Tax Supervisor, can tell you about that. You asked me for an opinion, so, therefore, I would say that that is a pretty good index as to the number of white persons on the tax lists [fol. 37] and the number of colored persons, as to the percentages.

I know that there are certain jury qualifications besides being a taxpayer, but those qualifications, the Commissioners do not pass on. They have no right to, after the jury box has been filled with the names. The Commissioners will speak for themselves, but from my observation the Commissioners would pass the name of an undesirable if it should appear on the list. They have no right to challenge the person's name, as I understand. That name goes on the jury order. They pass it, I think; they can explain. I would not say since I have been here that we have always had desirable persons on grand and petit juries—it depends on which side you are appearing on. They do meet the qualifications. I will say that I think the Board of County Commissioners consider only this: that they examine the tax returns, which is an entire list of the tax listers of the County, of all persons. They make an examination, and after the examination of that list in June of every odd year they order that that be the jury list of Forsyth County, as they did in this case, and in July, the subsequent month, they order that that list be placed in a box, as was done here. I wouldn't say that we always get the right person or right persons on the grand juries.

#### 1 Cross-examination.

At the meeting of the Board of Commissioners for Forsyth County on July 11, 1949, R. W. Craft, Chairman, and W. B.

Simpson, member, were present, and at the June 5, 1950, meeting R. W. Craft, James G. Hanes and William B. Simpson were present. At the June 5, 1950, meeting of the Forsyth County Board of Commissioners, from the box that Mrs. Ayers, as Clerk to the Board, presented to the Board, the jury box that was made up at the July, 1949, meeting 60 names were drawn to serve as jurors at the July 3, 1950, Term of Criminal Court, and 44 names were drawn to serve as jurors for the July 10, 1950, Term of [fol. 38] Court. As I have previously stated, I don't think I was up here in open court when the grand jury was selected on the opening day of the July 3, 1950, Term of Criminal Court, I might have been; I don't think so.

Immediately upon the little boy drawing those 60 names out of the box, they are pushed down to my secretary, who copies those names on a jury order. Not three hours later, but immediately after the meeting of the County Board of Commissioners, my secretary takes that list of jurors to Mrs. Ayers, who is Clerk to the Board, and she signs it and it is turned over to the Sheriff of Forsyth County. That was done on this occasion.

#### Re-direct examination.

I did not say I was not in the courtroom for the drawing in June 1950. I was asked by the Solicitor and by defense counsel also whether or not I was present here when the Grand Jury of 18 names was drawn, and I replied that I don't think I was up here in the Court, because all of that is done under the direction of His Honor here and I have no duty up here. I do come up here occasionally. I don't know whether I was here or not; I don't think so. I was present when the 60 names were drawn and when the 44 names were drawn.

HOWARD W. FLOYD, first duly sworn, testified: My name is Howard W. Floyd. I am Courtroom Clerk here. As such I was present in July 1950, when the Grand Jury was made up for this present term of court. I supervised the drawing under his Honor's direction. I cut the names up and placed them in a hat and then a child, who was present



in the courtroom, drew the names out of the hat. The child gave me the names as they were drawn from the hat. 18 names were drawn. I called the names of the jurors out and had them come up and sit in the jury box, and they [fol. 39] constituted the Grand Jury. The other names left in the hat were summoned as petit jurors. All of the names that were drawn were white, except one, Mrs. Mary Y. Matthews.

There was no occasion at that drawing of those names to take out any name because of being a non-resident, or deceased, or any other reason. The list was brought to me from the Sheriff's office and beside of the name was marked "summoned" or "not summoned" as the case may be. I did not put in the hat the names marked "not summoned." The names marked "summoned" were placed in the hat, and the first 18 names coming out of the hat, drawn by the child, were the ones serving as grand jurors for this term.

#### Examination by the court.

I do not know how many names the list contained which I received from the Sheriff, or when it was drawn. The list was delivered to me from the Sheriff's office the morning before Court opened. From that list I took the names of all persons who had actually been summoned by the Sheriff, placed those names in a hat, and a child of between three and four years of age drew those names out of the hat. The child could not read, to my knowledge. As the child drew each name out of the hat, he handed it to me; I called the name of the juror out, and that juror then became a member of the present Grand Jury, which passed on the bill of indictment in this case. No name drawn by that child was excluded from the Grand Jury, for any reason. There were only 18 names drawn, and they are the ones on the Grand Jury. There was no attempt on my part to place part of the names in one part of the hat and part in another; the names given to me on the list were thoroughly mixed up in the hat, and the first 18 names drawn from the hat then became the present Grand Jury.

[fol. 40] The State Offered the Following Evidence in  
 Regard to Defendant's Motion to Quash the Bill of In-  
 dictment:

"JACK GOUGH, first duly sworn, testified: My name is Jack Gough. I am a Deputy Sheriff of Forsyth County, serving under Sheriff E. G. Shore. Sheriff Shore is at present out of the city on an extradition matter.

A list of 60 names was brought into our office by Mr. Crews' secretary after the June meeting of the County Commissioners, which was to constitute the jury list for the July 3, 1950, Term of Court. All of the persons named on that list, that could be found, were summoned to appear at the July 3, 1950, Term of Court. I don't remember the number of persons summoned. I do recall that there were colored people, members of the Negro race, summoned for the July 3rd Term of Court; I don't know the exact number; it was four or five.

I recall that members of the Negro race have served here as jurors in previous terms of court. At the request of the Solicitor I have made an investigation with reference to that matter. First, I should like to explain that I cannot say to my definite knowledge that other than what I see up here are Negroes. I can say that a certain number live in colored residences and I take it for granted they are colored people, and some, to my personal knowledge, are colored, because I know them.

My independent investigation revealed that for the week of January 10th, for which week 54 jurors had been drawn, that week being the week the Grand Jury was drawn, said jury being drawn from the 54 names, there were five or more colored men or women on that particular week to my knowledge. There could have been more but I could only identify five of them as colored. July 4, 1949, for which week there were 60 names drawn—the law having been changed in between those two periods—there were six or [fol. 41] more members of the colored race. January 9, 1950, for which week 60 names were drawn, there were five or more members of the colored race. July 3, 1950, for which week 60 names were drawn, there were four or more members of the colored race.

I also have some figures taken at random from the regular jury, which was composed of 44 names. On June 12, 1950, from 44 names drawn there were four members of the colored race—in each case it could be more. My references are to persons of the colored race that I know and have identified positively as being of the colored race.— June 19th, out of 44 jurors drawn, there were five or more members of the colored race. July 10, 1950, out of 44 jurors, there were five or more members of the colored race. September 5th, which is our present week, out of 44 jurors there were six or more members of the colored race. September 11, 1950, which will be our term next week, out of 44 jurors there are 7 or more members of the colored race. September 18, 1950, for that week, out of 44 jurors there are 5 or more members of the colored race. I went up a little ways and back a little ways.

From the list that was handed me by Mr. Crews' secretary the only indication thereon as to whether the person was a white or a colored person was that which would be of common knowledge to anyone that knows the City and County, as probably their addresses. I couldn't take a name on there and swear under oath that it was a member of the colored race, but I would take it for granted if they lived on East 14th Street or Cameron Avenue that they were members of the colored race.

#### Cross-examination.

For the week of September 18, 1950, the week after next, I would say that 5 or more of the 44 names summoned for jury service are Negroes. I say "5 or more" because it is just common knowledge that by their addresses and by service [fol. 42] on a lot of them that they are members of the colored race. I do not summon all of the jurors. The list of names is distributed among the deputies and each one serves so many. I gather that 5 of that 44 are Negroes from where they live and from personal knowledge of some of them. I could be in error, but if I am it is because there is a white family living over in the colored section, which could happen. I don't know of any colored families living over in the white section, maybe living on the lot. I do know there are some Negro families living in the Ardmore

section or on the fringe of it, but I know pretty much where they are. The only things I have to guide me are the addresses of the people on that list and personal knowledge of some of them. I reach my conclusion that of the 44 persons selected for jury service for the September 18th Term, 5 are Negroes, from the fact that they give certain addresses and I know that Negroes live in that section. I can verify that statement, but I have not attempted to do so by taking those five addresses and going to the houses, or by determining from the deputy who summoned each one of those persons.

At the January 10th Term of Court there were 54 persons drawn for jury service and of that number there were 5 Negroes. I reached my conclusion about that in the same way as the other, not from actually seeing Negroes about whose racial identity there could be no question, but simply by seeing the list and the addresses next to the names and reaching the conclusion that the person is a Negro; but, in another respect, I have been here four years and I have yet to see a jury in the box or sitting back in the courtroom on which there wasn't at least one member of the Negro race.

ROY W. CRAFT, first duly sworn, testified: My name is Roy W. Craft. I am Chairman of the Board of County Commissioners for Forsyth County, and I was serving in that [fol. 43] capacity during June of 1949. At that time Mrs. Eunice Ayers presented to the Commissioners a list of the tax listers of Forsyth County. There was nothing on that tax list to indicate to me whether any person whose name appeared thereon was a member of the Negro or white race. We instructed Mrs. Ayers to prepare that list by cutting the names apart in a uniform manner and presenting them at the July meeting, after scanning the list. Of course we did not take the time to read the entire 40,000 names, but we did glance through it, the Commissioners did, and we passed it on with the instructions to prepare it for our coming meeting. We, the Commissioners, were informed that that was the tax list of Forsyth County for the year 1948, and that it included all the names that appeared on the tax list,



excluding non-residents and persons under the age of 21 years.

At the July meeting the Commissioners met and prepared that jury box. There were no names left in the box; it was cleaned out entirely. All of the names that had been presented to the Commissioners at the June meeting were placed in that box in Section #1. The box is right here in the courtroom. None of the names presented to the Commissioners at the June meeting was excluded from the box. After that meeting the box was turned over to Mrs. Eunice Ayers, as Clerk to the Board, for safekeeping. At the July 1949 meeting there was no way for me to know whether the person was white or colored other than if I happened to know the person.

I was present at the June 1950 meeting when the 60 names were drawn for the July 3rd Term of Court. I saw the child draw those names from the box. The child is supplied by the Sheriff's Department. It isn't always the same child, but it is usually a very young child, certainly under the age of ten, and he is placed on a chair or up on the table alongside of that tall box, so he can reach in. The child draws them out one at a time and they are passed on [fol. 44] by the Commissioners down to Mr. Crews' secretary, who copies them on the jury list. There were no names excluded at the July 3rd meeting, to my knowledge. They were all turned over and listed on the jury list for the July 3, 1950, Term immediately after they were drawn—not two hours later, but immediately. After the names that were drawn were listed, those slips that had been pulled out were put back in the box, in the #2 section, for future use. At that meeting or any other meeting, the only way I could determine whether the persons whose names are drawn are white or colored is from personal knowledge of the individual. Occasionally I know them. I don't know them all, white or colored.

#### Cross-examination.

As far as my personal knowledge is concerned I don't know anything about that code. That is for the bookkeeping department downstairs. Mr. Click says there is one. There is a number of some kind on it, but I do not know

what it means. The jury box is here, if counsel desires to see one. I will be glad to show counsel one to let him see if he can tell whether it is white or colored. Mr. Click classes it as a code. We Commissioners do not take enough time to walk downstairs into the Tax Supervisor's office and decipher the code. The names are drawn by the little boy, both white and colored, and are immediately typed on that sheet. Even if I had the desire to go downstairs and decipher the code, I do not have the time. That would be considerable trouble. I would have to go downstairs and make a lot of inquiries. The code may be uniform, but we can't hold up a meeting for a fellow to go downstairs. If it were the digit "2" for colored and the digit "5" for a certain township, it wouldn't mean a thing to me. It is just a number, as far as I am concerned, and I am quite sure I can say that for the other Commissioners, because I have heard them say they didn't know one from the other. The numbers do appear on the lefthand corner of the list.

[fol. 45]

Examination by the Court.

In originally placing the list in the box at the June-July meeting, 1949, there was no effort made by me or the Commissioners to either exclude or limit the number of people of the Negro race in that list. I assisted Mrs. Ayers in packing the names or scrolls in the box; the box was quite filled. That was a complete list of all the tax listers in Forsyth County for the year 1948, both white and colored, with the exception of those under 21 years of age and those known to be dead.

At the June 1950 meeting, when the 60 names were drawn from which the present Grand Jury were taken, there were no names excluded for any reason from the names drawn by the child from that box. There was no effort made at that meeting on the part of myself or any other member of the Board of Commissioners to limit or to exclude the name of any colored person from that jury list. The 60 names as turned over to the Sheriff, constituting the jury list for the July Term, contained the 60 names originally drawn by that child from the box.

NAT S. CREWS (Recalled to the stand by the Court) testified:

Examination by the Court.

In this county, we draw a Grand Jury the first week of the January Term, which serves for six months, and then at the July Term we draw another Grand Jury, which serves until the following January. Our grand juries serve for six months. We have a special statute for the county, enacted in 1937, which was amended in 1947 and again in 1949. The last amendment provides that the Grand Jury shall be selected to serve for six months after the first term of Court after the 25th day of December and after the 25th day of June of each year, I believe. A Grand Jury was selected in January of this year for this county and that Grand Jury served through the month of June of this year. The [fol. 46] present Grand Jury was selected on the 5th day of July of this year, that being the first day of the July Criminal Term, and that Grand Jury is still serving and will continue to serve until a new Grand Jury is selected in January.

At this point in the trial, as Mr. Crews left the stand he handed to the Court a paper writing which the Court directed to be marked:

"EXHIBIT A":

Chapter 206, 1937 Public Local Laws (as amended by Chapter 264, 1947 Public Local Laws, and as amended by Chapter 577, 1949 N. C. Session Laws).

An Act to Regulate the Grand Jury of Forsyth County. The General Assembly of North Carolina do enact:

Section 1. That at the first week of the first term of court for the trial of criminal cases in Forsyth County after the first day of July, one thousand nine hundred and thirty-seven, there shall be chosen a grand jury as now provided by law, and said grand jury shall serve until the first day of January, one thousand nine hundred and thirty-eight "and thereafter at the first week of the first term of the criminal court convening after the twenty-fifth day of December and June of each year there shall be chosen a grand jury to serve for a term of six months."

Section 2. The judge presiding at the time of the selection of the grand jury shall charge it as provided by law, and at any time the Judge of the Superior Court presiding over the criminal court of Forsyth County may cause said grand jury to assemble and may deliver unto said jury an additional charge.

[fol. 47] Section 3. The judge presiding at any term of criminal court of Forsyth County may in his discretion discharge any or all of the members of the grand jury or fill any vacancies occurring in the grand jury by reason of death, removal from the county, sickness, or otherwise, and any such vacancy or vacancies shall be filled by drawing sufficient jurors to fill said vacancy or vacancies from the jury box, and said juror or jurors so drawn shall take the oath prescribed by law and shall fill out the unexpired term of the juror or jurors whose places they were drawn to fill. The presiding judge shall have the power in his discretion to appoint an assistant foreman, and said assistant foreman so appointed shall in the absence or disqualification of the foreman discharge the duties of the foreman of said grand jury.

Section 4. That at the first week of the terms of criminal court of Forsyth County at which a grand jury shall be selected in accordance with the provisions of this Act there shall be drawn and summoned sixty men in the manner now provided by law from which a grand jury shall be selected as herein provided for, and the persons drawn for service on the grand jury for the week at which said grand jury is selected and who are not selected to serve on the grand jury shall serve on the petit jury: Provided that for the second week of the term at which the grand jury is chosen and for each week of other terms of the Superior Court of Forsyth County, civil and criminal, both regular and special, forty-four jurors shall be drawn and summoned as provided by law.

Section 5. All members of the grand jury shall receive five dollars (\$5.00) per day for their service for every day devoted to the duties of the grand jury.

Section 6. That all laws and clauses of laws in conflict with the provisions of this Act are hereby repealed.



[fol. 48] Section 7. That this Act shall be in full force and effect from and after its ratification.

In the General Assembly read three times and ratified, this the 9th day of March, A. D. 1937.

ROY HINSHAW, first duly sworn, testified: My name is Roy Hinshaw. I am the Tax Supervisor for Forsyth County. I have served in that capacity since July 15th of this year. I have checked the tax listings for Forsyth County for the year 1948 with reference to the persons in Forsyth County, both inside and outside the City of Winston-Salem, who listed their poll taxes, and have broken the figures down with relationship to the members of the white race and the Negro race. My investigation revealed that for the year 1948, 7,659 white males between the ages of 21 and 50 listed their poll taxes in Winston Township, and there were 2,752 colored males between the ages of 21 and 50 who listed their poll taxes in Winston Township in 1948. In the County of Forsyth, outside Winston Township, there were 10,319 white males between the ages of 21 and 50 who listed their poll taxes in 1948, and there were 587 colored males between the ages of 21 and 50 who listed their poll taxes in the County of Forsyth, outside Winston Township in 1948. Every male person over the age of 21 and under the age of 50 is required to list poll taxes. 84.3% of all the polls listed were by white persons.

I believe it is true that it is a matter of common knowledge that the percentage of white people living outside the City of Winston-Salem is far greater than in the City of Winston-Salem, as compared with the colored population. Just exactly what the percentage is, I do not know and do not have at this moment.

#### Examination by the Court.

The list which I have given has no connection with the persons who actually paid poll taxes in 1947 or 1948. I [fol. 49] have given the numbers of polls listed.

Direct examination continued.

Every male person between the ages of 21 and 50 in the county is required to come to the list-takers in the Court-house during the month of January, or, if it is extended, the month of February, regardless of whether they have property or not, and are required to list their poll taxes each year.

Defendant's motion is denied and defendant, in apt time, excepts—Exception No. 2.

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IN SUPERIOR COURT OF FORSYTH COUNTY

ORDER ON MOTION TO QUASH BILL OF INDICTMENT

This cause coming on to be heard and being heard before Hon. Dan K. Moore, Judge Presiding, September 4, 1950, Criminal Term of the Superior Court of Forsyth County, and being heard upon motion to quash bill of indictment returned by the Grand Jury of Forsyth County, charging the defendant Clyde Brown, with the capital offense of rape, and said motion being made by Hosea V. Price, Attorney, who made a special appearance for the defendant, Clyde Brown, and it appearing to the Court from the testimony and evidence of several witnesses under oath, and from the hearing held and conducted the Court finds the following to be facts:

Facts

That at the June 6, 1949, meeting of the Forsyth County Board of Commissioners there was laid before the Board of Commissioners the tax returns of Forsyth County for the year 1948, which, after an examination of same were ordered by the Board of Commissioners to be the Jury list of Forsyth County for the purposes set forth in Sec- [fol. 50] tion 9-1 of the General Statutes of North Carolina, as amended, the Commissioners being of the opinion and so ordered that the jury list be confined to the tax returns, and that to use other sources of information would cause a duplication of names in the Jury list and the

placing in the Jury box the names of persons who were not qualified to serve; that at the July 14, 1949, meeting the Forsyth County Board of Commissioners did cause the names of the Jury list which had been selected at the June 6, 1949, meeting to be copied on small scrolls of paper and put in division one of the Jury box, but before placing said names in the Jury box did take therefrom all names of persons from the Jury box and destroy same; that the tax returns of Forsyth County for the year 1948, which were laid before the Board of County Commissioners at their June 6, 1949, meeting, and which the Board of Commissioners ordered to be the Jury list of Forsyth County, was prepared at the request of Eunice Ayers, Clerk to the Board of Commissioners, and at the request of the Forsyth County Board of Commissioners on the International Business Machines leased by Forsyth County and used in the Forsyth County Tax Supervisor's Office for the purpose of preparing the tax records, under the direction of John Click, who was in charge of said IBM machines for Forsyth County at that time, and that said Jury list was prepared from the 1948 IBM card file and represented the tax returns of Forsyth County for the year 1948, and that said method of procedure of preparing the Jury list on said IBM machines did produce a complete list of eligible persons without discrimination, elimination, or limitation whatsoever as to persons of the Negro race and persons of African descent, or any other persons of any race, color, or creed; that at the June 5, 1950, meeting of the Forsyth County Board of Commissioners a jury of sixty names was drawn for the July 3, 1950 criminal term of the Superior Court of Forsyth County from which a grand jury was to be subsequently selected; the names [fol. 51] being drawn from division one of the Jury box by a child less than ten years of age, in accordance with Chapter 206, 1937 Public-Local Laws as amended by Chapter 264, 1947 Public-Local Laws, and as amended by Chapter 577 of the 1949 N. C. Session Laws, and in accordance with the General Statutes of North Carolina relating to same; that at the July 3, 1950, Criminal Term of the Superior Court of Forsyth County a Grand Jury of eighteen (18) persons was drawn in open Court by a child

less than ten (10) years of age from the list of sixty (60) names which were drawn at the June 5, 1950, meeting of the Forsyth County Board of Commissioners. All of the foregoing the Court finds to be facts: And from the testimony of various witnesses under oath from the hearing conducted, and from the facts found by the Court, the Court concludes as a matter of law:

#### Conclusions of Law

That the Jury Selection Statutes of North Carolina, Section 9-1, as amended, 9-2, 9-3, 9-24, and other General Statutes of North Carolina relating thereto, including Chapter 206, 1937 Public-Local Laws, as amended by Chapter 264, 1947 Public-Local Laws, and as amended by Chapter 577 of the 1949 N. C. Session Laws, were in all respects complied with in the preparation, selection and drawing of a Grand Jury for the July 3, 1950, Criminal Term of the Superior Court of Forsyth County, and that in all stages of the procedure followed in compiling a list of jurors there was no discrimination whatsoever as to race, color, or creed of persons, nor was there any plan, purpose in mind, or acts of any of the persons connected with the preparation, compiling and drawing of the Grand Jury of systematically limiting representation thereof of Negroes and persons of African descent, and that said Grand Jury of Forsyth County for the July 3, 1950, Criminal Term was in all respects lawfully constituted, and that the Constitution of the United States of America, and the [fol. 52] Constitution of North Carolina, and the General Statutes of North Carolina, and any and all Public-Local Acts relating to the preparation of the Jury list and the drawing of the Grand Jury for the July 3, 1950, Criminal Term of the Superior Court of Forsyth County have in all respects been complied with.

It is, therefore, ordered that the Motion of Clyde Brown to Quash the Bill of Indictment returned against him by the Grand Jury of Forsyth County, charging the defendant, Clyde Brown, with the capital offense of rape be, and the same is hereby in all respects dismissed.

September 11, 1950.



To the foregoing order of the Court, the findings of fact, conclusions of law and denial of motion contained therein, the defendant, in apt time, excepts—Exception No. 3.

IN SUPERIOR COURT OF FORSYTH COUNTY

JUDGMENT

Clyde Brown, you have been indicted, tried and convicted by a jury of your county of the rape of one Betty Jane Clifton without any recommendation of life imprisonment. The law prescribes, in General Statutes of North Carolina, Section 14-21, as amended, that the punishment for your crime is death. The judgment of the Court, therefore, is that you be remanded to the common jail of Forsyth County and there remain until the adjournment of this Court.

It is ordered that you be conveyed by the High Sheriff of said County of Forsyth to the Penitentiary of the State of North Carolina, and by him delivered to the Warden of said Penitentiary;

[fols. 53-55] And it is further ordered and adjudged that you remain in the custody of said Warden until Friday, the 20th day of October, 1950, and that on said day, between the hours of ten o'clock in the forenoon and three o'clock in the afternoon, that you be taken by the said Warden to the place of execution in said Penitentiary;

And it is adjudged that the said Warden then and there cause you to inhale lethal gas of sufficient quantity to cause death, and to continue the administration of such lethal gas until you are dead. And may God have mercy on your soul.

This the 15th day of September, 1950.

Dan K. Moore, Judge Presiding.

[fol. 56] IN SUPERIOR COURT OF FORSYTH COUNTY

STATE'S EVIDENCE

THOMAS E. GLIFTON testified: On the 16th day of June 1950 I was hauling soft drinks, and as an avocation I operated a radio shop up on West Seventh Street, between

Trade Street and Liberty Street, approximately 50 feet off of Trade Street and on the South side of Seventh Street. At the time this happened, my daughter, Betty Jane Clifton, was in charge of the radio shop in my absence. I have ten children, three girls and seven boys. I have a boy and a girl older than Betty Jane:

The school term had just closed and Betty Jane Clifton had just finished the ninth or tenth grade. At that time, June 16, 1950, she just stayed there in the radio shop and kept it open and took the radios in, if any were brought in. She would take the name of the person bringing the radio in, put it on a card and give the person a stub, and if anyone came after a radio, she would check the stub and take the stub and collect the money and put it in the drawer. She had been in charge of the shop since about the 7th or 8th of June. I do not know exactly what day school closed.

I don't know exactly what time Betty Jane went to the radio shop on June 16, 1950, but it was around 8 o'clock. I do not know how she got there on that occasion; I did not carry her to the shop that day. I left home first that day. She always goes down and catches a bus on the corner. The first time I went by the radio shop that morning was somewhere around 7:30. The shop was not open at that time. The next time I went by it was around a quarter past 12. I usually always check by there two or [fol. 57 three] times a day, if I can. I had been on my regular drink routes that morning as a soft drink distributor. When I went there at approximately a quarter past 12, that was at the noon hour. At that time I drove up there and stopped. I saw the door was opened just about six inches—the door swings inward—and I knew that it wasn't supposed to be closed in hot weather. So I dashed in there and called Betty Jane's name. I couldn't see her anywhere and didn't hear no sounds, only just a faint sound. I didn't pay any attention to that.

I looked all around and I went next door and asked if they had seen her, and then I asked up at the tire shop if she had been up there and used the telephone or anything, and then I went back and went in the shop again and looked all around, and I kept hearing that little faint

racket, and I got to trying to detect where it was at, and I found the racket and found Betty Jane there, laying on her face, stretched out, making a noise, which was the racket I had heard, and then I dashed back out of there and called the ambulance and called Police Headquarters, and by that time people across the street knew there was something wrong, they had seen me running, and they came to my aid.

I don't know the size of my shop, exactly. It is somewhere around about 16 x 20. There is a counter in the shop, which is about 6 feet away from the back wall, and the counter runs parallel with the street. The side of the counter facing the street is all covered up, but the back side of the counter is open.

Betty Jane was lying on a bed, right underneath the bench or counter. The bed I refer to was just a little iron cot, and all that was laying on the cot was a quilt, and she was laying on the quilt, and there was a mattress on top of her. She was laying so flat that the mattress didn't have more than a very slight angle. Betty Jane was lying on her stomach and face, and had her [fol. 58] head turned sideways.

I saw all the blood and everything, a big puddle of blood on the quilt and things. When I found her I discovered all that. The top was broken off of one radio, and that is about the only thing I found other than that. I didn't find anything like a weapon, but I was right there when other people came in later, and I saw them find them. I went with Betty Jane to the hospital and then rushed back to the shop and got there about the time that the detectives got there. I'd say it was around five or ten minutes from the time I first saw Betty Jane until the time the ambulance arrived there; it wasn't very long; I'd say about 5 minutes.

I made no observation, myself, about her physical condition other than the state of unconsciousness I have described. When I went to the Emergency Room, they wouldn't let me in; they said - wasn't anything I could do. I could go on back, so I went on back to the shop.

The pocketbook you hand me looks like it is damaged pretty bad, but it looks like the one she used to have.

(Referring to photograph in billfold): That is her brother, Douglas, a picture of him. (Referring to other articles in billfold): I don't know anything about that or that (indicating). This is a key to the radio shop, my radio shop. (Referring to another photograph): I don't know that girl. That is all the pictures, I believe, that I know in that. This is a cleaner's check, from Advance Cleaners. I don't know anything about that card. I haven't seen that card there before; I heard her talking about having some books in the library or from the library.

Q. What is your opinion with reference to that being the pocketbook of your daughter, Betty Jane?

[fol. 59] Objection—overruled, and defendant, in apt time, excepts—Exception No. 4.

A. I didn't know too much about her pocketbook. My wife and her knew more about her pocketbook than I did, because my wife ordered it for her.

I don't know of anything, except my daughter, that I moved in my shop at the time I went in; I don't remember moving anything. The only thing that I moved was the mattress, off of her.

#### Cross-examination

My radio shop is a small shop, measuring about 16 x 20 feet inside, and is on 7th St., just off of Trade St. There is about a 6-foot space from the counter to the back wall. The cot I spoke of is a little iron bed. It is all made together. It has legs on it, but it was flat on the floor. When it is raised up, there is about a foot or more under there, but it wasn't raised up; it was laid down. There is not room enough for it to be raised up there and sleep on it. That is why I always kept it flat. The bedding consisted of a mattress, the mattress we were using on the bed. That was all pushed back under the counter. The counter was around about 30 inches high. The top part of it served as a counter and the whole thing, whole top of it, served as a work bench.

After I went into my shop and discovered what I have testified to here, I went out of the shop and up the street. Some of the neighbors came from across the street to assist me. Mr. and Mrs. Grossman, who run a record shop



across the street from my radio shop, came across the street to help me. They came over to my aid after I came back from using the telephone. Immediately after I discovered my daughter there on the bed, I went outside and made an alarm and Mr. and Mrs. Grossman came over immediately. Mrs. Grossman stayed there with me and my daughter until the ambulance came.

[fol. 60] I testified that I didn't move anything at all except to take the mattress off the top of my daughter. I didn't move her body at all.

I have operated my radio shop in that spot there about two or three years. When the ambulance came and carried my daughter away, I went with her to the hospital. I stayed over there a few minutes and came right back to my shop. They wouldn't let me in, so I just came on back to the shop. I got back somewhere around about the time the officers got there.

Dr. HARRY W. GOSWICK testified: I am a practicing physician here in the City of Winston-Salem. I am a graduate of the medical school of the University of Tennessee. My academic education consisted of four years at Emory University and four years at the University of Tennessee, following which I served a one-year internship at the City Hospital here, and two years as a resident at the same place. I have been practicing medicine since 1934 as a general practitioner. I have been admitted to the State Board of Medical Practitioners in the State of North Carolina.

(Defense counsel admitted Dr. Harry W. Goswick to be a medical expert, and the Court so held).

I was called to the City Memorial Hospital on the 16th day of June of this year to see Betty Jane Clifton. I had not known her prior to that time. When I first saw her, she was admitted to the hospital, she was in Ward 211 and was still on a stretcher; she had not been put to bed. That was around 5 o'clock P. M.

At that time, 5 o'clock P. M. June 16, 1950, Betty Jane

Clifton was obviously beaten severely. Both of her eyes were swollen shut and blue; she had four or five lacerations on her right ear, two on her ear lobe, one in front of her ear, and another here (indicating) a large one above [fol. 61] her ear, and she had two cuts on the other ear, and one under her chin. She was in severe shock. Her blood pressure was down about 60 or 70. Her pulse was real rapid; it could hardly be counted. She had bubbling respiration, breathing with difficulty. She had to be given oxygen; and we had to use a suction to suck the secretions out of her throat. She was given blood and glucose intravenously to combat her shock, and at that time we did nothing to the cuts except wrap them up, because she was in too bad shape to do anything to her.

At that time, she was not completely unconscious, as we think of it. She would move about, thrash about in the bed and moan, but she did not know anything.

I was the attending physician for Betty Jane Clifton during her stay at the hospital, except for possibly four days over the 4th of July, when I was out of town.

When Betty Jane Clifton first came in the hospital, she was in shock, and she continued in shock for 48 to 72 hours, and we gave her glucose and blood and all those things to combat her shock. She remained in that same semi-conscious condition for approximately a month.

When she first came in the hospital, either that day or the next day, she was x-rayed and a fracture of the skull was found. She also had a fracture of the left lower jaw, just below the ear. There was also a fracture of the zygomatic arch, is the only way I know to say it—it is this cheek bone, in other words (indicating). There was also a fracture of the base of the eye socket, in which the eye sits. We continued to treat her, expectantly, more or less, to try to bring her out of her shock. She was given different drugs, penicillin and chloromycetin, to combat any infection that she might develop in her wounds. She progressed slowly. Several spinal punctures were done, which showed that she had in [fol. 62] creased pressure in her spinal canal, and there was also blood in the spinal fluid, indicating some brain damage. } For about a week we worked pretty steadily

12  
with her, trying to get her back to some state to where we thought she might progress all right; and then there were several other bruises on her, also. "On both hip bones there were large blue places, and on the back of her right hand there was a blue spot.

About a week after she was brought to the hospital, possibly the 23rd or 24th, I made an internal examination on her. The reason I had not made one before that time was because she was in such terrible shape that that was secondary in my mind, as to what had happened there. The first thing was to get her well. On the 24th I made a pelvic examination. I found a laceration about a quarter of an inch long, possibly an eighth of an inch deep, at the posterior part of her vagina—that is the back lower part—and also there was a tear in the hymen at—explaining in terms of a clock—7 and 3 o'clock. The hymenal ring was about  $1/16$  of an inch in depth, and it was torn completely back on each side, which would be  $1/16$  of an inch on each side, torn completely through.

The female organ consists of two labium majora. It is large lips on the outside. Just within these are the labia minora, which are smaller lips, and then inside of those is the hymen. The part to which I referred as posterior, the back lower part of the vagina, is outside the hymen but inside the labia minora, between the hymen and the labia minora. There is no other part of the female organ between the labia majora and the hymen that I haven't mentioned, not directly in front of it.

Q. I want you to tell the jury, with reference to the age of these, what the age of these tears were, that you have described?

[fol. 63] A. Well, they were still—of course, I couldn't tell exactly, but they were still—

Objection—overruled—defendant, in apt time, excepts—Exception No. 5.

A. I couldn't tell the exact date, but the tears were still fresh and raw, which indicated that they were recent.

Q. In your medical opinion, what would you say the age of them was?

Objection—overruled—defendant, in apt time, excepts—Exception No. 6.

A. Well, that is a little hard to say.

Q. Well, approximately—your best opinion about it, Doctor?

A. Well, I'd say they couldn't have been over ten days.

Q. Do you have an opinion, satisfactory to yourself, as to whether the female organ of Betty Jane Clifton had been penetrated, sir?

Objection—overruled—defendant, in apt time, excepts—Exception No. 7.

A. Yes, sir.

Q. What is your opinion?

A. My opinion is that it had been.

Betty Jane Clifton remained in the hospital until August 10th. At no time in my examination of her has Betty Jane Clifton had any recollection as to what has happened to her. I have an opinion, satisfactory to myself, as to whether Betty Jane Clifton, after suffering the wound and injuries that I have described and having remained in the condition that I have described she remained in there for the period between the 16th day of June 1950, and the 10th day of August 1950, would have any recollection or memory as to what happened to her; [fol. 64] in my opinion, she does not; I would like to say, that she was not in the state of unconsciousness until August 10th. On the 12th of July she sat up in bed and opened her eyes, and on the 14th she began to talk. My opinion would be that she would not have any recollection after suffering that period of unconsciousness and those wounds.

The hymenal ring is a ring of tissue just inside the inner lips of the female external organs, separating them from the vagina, which is the internal. It is commonly known as the maidenhead. That hymenal ring has an opening, but not in all cases. In this case the hymen was perfectly normal, except for the two tears in it, which would allow two fingers to enter into the vagina. I found no old tears of any kind.

#### Cross-examination.

The examination of the female organs took place on the 23rd or 24th of June. Up to that time I had made



no examination of the private parts of Miss Clifton. It is customary for a physician to make a record of his examinations, progress notes, and so forth, on the hospital record. I made them in this case. I don't know that I wrote a progress note every day, but we probably wrote orders every day.

I have a large enough practice. My "astounding memory about every detail of that examination in my treatment of Miss Clifton, without reference to some notes," is due to the fact that this was not the usual run of case that you have. You don't see these once every two or three years, and naturally you'd remember about it.

Q. Well, usual or unusual, Doctor, isn't it one of the cardinal practices or principles in the practice of medicine in the treatment of a case where even there is a hint or suspicion that there has been rape, that you make detailed records and reports of it?

[fol. 65] Objection—sustained—defendant, in apt time, excepts—Exception No. 8.

We do usually make notes of all those cases, and I made notes of this case. Those notes are not here in the Court-room to my knowledge; I don't know that they are. (The Solicitor handed defense counsel two batches of papers). These are the nurses' notes which you hand me. There is more or less a compilation of the progress notes and doctor's orders that I gave in this case. Among these notes, and orders there will be found not only diagnoses, but treatment records. I also have in there notes as to what I found on the 24th of June. Those records are made up by a number of people. The admitting office made the front sheet, the typewritten part on it, and then that is taken back to the room with the patient. The nurse adds these other pieces of paper, temperature chart, progress notes, history, and so forth. In this case the resident wrote that admitting note counsel is referring to. All of these records do not purport to be doctors' reports; these are (indicating), and they are signed by the physician who made the examination or ordered the treatment in the case. There was no rearrangement of that file to my knowledge. I had it in my possession. There was no rearrangement of that file by me and no rewriting of any.

portions of the record. The Record Room would have that. The nurses' records are made up on separate sheets altogether. They would form no part of the progress notes of the physician and the physician's orders. Those are physicians' orders and progress notes of Dr. Dale, Dr. Pearlman, me, and other physicians who treated and prescribed in this case. The nurse keeps the temperature sheet. Aside from the temperature sheet and other minor notations, the nurse doesn't do anything with those notes made by the physician except to check when she has followed the orders of the physician.

The first sheet is made out in the admitting office when the patient comes in, first. (Two batches of paper written [fol. 66] were marked: "Defendant's Exhibit No. 1 for identification", and "Defendant's Exhibit No. 2 for identification.") The entry that is made here (indicating) in the hospital record was made on the 24th day of June 1950, by me, and it is dated the 24th day of June. I was not present when Dr. Dale made an entry. I was not present when Dr. Pearlman made an examination. Dr. Odom took care of Miss Clifton while I was away over the 4th of July; Dr. Jeffreys saw her several times, and Dr. Blair fixed her jaw. I doubt that their notes are in there. Dr. Blair has some notes, I think, but I don't believe Dr. Jeffreys made any or Dr. Odom, either. They did not make any progress notes whatever.

I testified to finding two tears in the hymenal ring, at 7 o'clock and 3 o'clock. I don't know what caused the tears. I can't say "yes" and I can't say "no" to whether it isn't unusual to find a tear in the hymenal ring. The Solicitor asked if it was always completely covered; it is not, no; very rarely it completely covers the vagina. It is an opening with a thin piece of tissue, in this case 1/16 of an inch wide, entirely around the vaginal opening. I can't agree that it doesn't take any great force or that it takes very little pressure to tear or rupture the hymen; sometimes it does and sometimes it does not. I don't know in this case whether it did or not.

The hymen is very easily ruptured, as a rule. There are many different kinds of hymens. One kind is simply, as it was in this case, a small band encircling the vagina; about

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1/16 of an inch wide. I don't know the exact names of them.

Q. Is that the one they call the crescentric?

A. I don't know the exact names.

Q. It is already open, so you couldn't tell whether it ever covered it or is just like that from nature? Isn't that right?

[fol. 67] A. I have never seen one.

Q. You have never heard of a crescentric?

A. How do you spell it?

Q. C-r-e-s-c-e-n-t-r-i-c. Crossen is a recognized authority on that, isn't he?

A. I don't admit anybody as an authority in this but me.

Q. Did you ever study Crossen?

A. I don't think so.

There is an imperforate hymen, which is a piece of tissue that entirely covers the vagina, with no opening in it at all, and then they have others that have very small openings in them, possibly 1/8 of an inch. I can't recall right now the medical terms for all of them. I can't remember any more right now. I don't believe I can describe, for the benefit of the Court, the crescentric hymen. "Crescentric" means crescent-shaped, in which case it would seem to me there would be just a crescent of tissue there, as a hymen, separating the vagina from the exterior. It would suggest to me it has an opening. I am not familiar with that type. There could be such a type, I suppose. The hymen is neither opened nor closed; it is just a ring. It either covers or doesn't cover the vagina, and if it doesn't cover the vagina, it has an opening in it, and if it completely covers the vagina, it is a closed drum-shaped affair, like the head of a drum.

In this case, the patient had a ring of tissue approximately 1/16 of an inch wide, completely encircling the vaginal opening. Betty Jane Clifton is about 17 years of age. I testified that I was able to insert two fingers in her vagina. That is very unusual in the case of a 17-year old girl; I think that is very unusual; in the greater per cent [fol. 68] of the cases, you cannot insert two fingers in the



vagina; I have an explanation and opinion about that in this case.

I have seen Betty Jane Clifton one time professionally since she left the hospital. I do not know what caused the laceration I spoke about finding at the juncture of the labia.

The first time I saw Miss Clifton was about 5 o'clock P. M. on June 16th. I did not make my vaginal examination until the 24th, seven days later. I waited until then because an examination had already been made, and I didn't see any point in doing that when she was in such terrible condition. It wouldn't have helped her condition any for me to have examined her that way. I did not make the other examination, but it was on the record. I was the physician in charge of this case. I was concerned about doing everything I could and finding out all I could about the case. I did not prefer to rely upon the other examination. I was asked to make an examination on the 24th of June by Mr. Daughety, the Superintendent of the Hospital. I don't know why he asked me to make it. That is not the only reason I had for making the examination on the 24th; I would have made one anyway. I was relying on the examination that had already been made. I knew at that time that Dr. Dale had made the other examination, and I relied on that examination up until the 24th of June. Then I was requested by Mr. Daughety, the Director over at the Hospital, to make a vaginal examination, and that is why I made it.

Miss Clifton regained consciousness July 12th, and she left the hospital on the 10th of August.

When I gave Miss Clifton the vaginal examination on June 24, 1950, I prescribed no treatment whatever connected with that. It isn't customary to prescribe some kind of treatment where you find any condition at all, and I [fol. 69] didn't do it. Dr. Dale did not prescribe anything for this particular thing we are talking about now. I don't think it will show in the record that he prescribed something.

### Re-direct examination.

The only doctors I have any knowledge of seeing Miss Clifton were Dr. Dale, Dr. Blair, Dr. Jeffreys, Dr. Pearlman, Dr. Odom, and I, and Dr. Andrews, who saw her one time on account of a bladder infection. Dr. Andrews is a kidney specialist. Dr. Jeffreys is a brain specialist. Dr. Blair is a dental surgeon. I have no idea where Dr. Pearlman is now. Dr. Pearlman was a resident at the hospital at that time; he is not there now; I don't know how long he had been gone from there. Dr. Odom, who cared for Miss Clifton while I was away over the 4th of July, is a practicing physician here in town, but he had nothing to do with the case except to assist me while I was away on my vacation.

In this instance, Miss Clifton had, rather than a closed hymen, a hymenal ring, which is the normal sort of thing in a female. To have a hymen entirely closed is more or less an abnormal thing. The hymenal ring is a tissue within the lips of the female organ. If an object greater than the size of that hymenal ring is inserted into that hymenal ring or pressure brought upon it, it will usually break.

Q. If an object of lesser size than that hymenal ring was inserted, what would be the natural reaction?

Objection—overruled—defendant in apt time excepts—  
Exception No. 9.

A. There wouldn't be any reaction, provided it went directly through the center of the opening.

You could not have a tear of the hymenal ring without exertion of some force.

[fol. 70] Q. You spoke of not prescribing treatment for these tears that were present the 24th of June. You say that is customary, not to make any prescription?

A. Well, it depends upon the case, of course. I mean, it depends upon the laceration and how they were doing. At the time that I saw her, they were healing all right.

One of those groups of sheets constitutes the nurses' records at the City Memorial Hospital during Miss Clifton's stay there, and the other group of sheets constitutes the doctors' records during Miss Clifton's stay there.

Combined, they constitute the record of Miss Clifton, her medical record, at the City Memorial Hospital during her stay there. Her complete medical record cannot be read without the use of both of them. The sheet referred to here was already made at the time I took the patient in charge, the typewritten part was.

DR. F. P. DALE testified: My name is Dr. F. P. Dale. On the 16th day of June of this year I was working at the City Memorial Hospital as Assistant Resident in Surgery. Dr. Pearlman was also there at that time, in the capacity of Assistant Resident in Surgery. He was not assistant to me at that time. I am now Resident in Surgery at the City Hospital; on the 16th of June I was Assistant Resident in Surgery. At this time Dr. Pearlman is a practicing physician at Leaksville.

I got my academic education at Temple University. I got my B. S. Degree at Wake Forest, and did my medical work at Temple University Medical School, graduating from there with an M. D. Degree. At this time I am admitted to the practice of medicine in North Carolina and Pennsylvania. (Dr. Dale was admitted by defendant's counsel to be a medical expert, and so found by the Court). [fol. 71] I was on duty at the City Memorial Hospital on the 16th day of June of this year, and I saw Betty Jane Clifton on that day around 12:35 to 12:40 in the Emergency Room at the City Hospital. She was in a state of shock on admission; her blood pressure was below normal limits; she had severe contusions and both eyes were swollen to the point that it was impossible to see the contents beyond the lid of the eye; she had marked lacerations of both ears and a marked laceration of the left side of the scalp, extending about 4 inches, and she was thrashing, in a semi-conscious state, and she had other bruises over her body which could be seen easily superficially. It was obvious that she had a broken jaw, and it was also obvious that she was suffering internal cranial injuries, and she had suffered loss of blood.

Approximately three and a half to four hours after her admission, rather, arrival at the hospital, I made an exami-

nation or observation of Betty Jane Clifton in the region of her female organ. At that time I noticed she had several bruises around the thigh and on the inside of the legs and also there was bright red blood coming from the posterior portion of the vagina, which was traced to a small laceration at the posterior hymenal ring extended out onto the labia, which is the skin. I examined her there just to the extent of observation. I did not probe her female organ. I just made the observation of where the blood was coming from, and it was coming from the posterior portion of the hymenal ring; it was fresh, red blood. There were bruises about her hips and on the insides of her legs; there were no lacerations observed by me there.

I have an opinion satisfactory to myself as to whether Miss Betty Jane Clifton's female organ had been penetrated or not; my opinion is she had. I did not make further examination at the time because it was considered unnecessary and not relevant to the case, her condition was [fol. 72] such that it was not satisfactory to proceed further.

#### Cross-examination.

I see quite a few patients over at the hospital. At that time there were two other assistant resident surgeons. I did not have charge of the Emergency Room and was not working in the Emergency Room at that time; I was just called to the Emergency Room.

I made a record of my diagnosis and orders in regard to this patient, after she was admitted to the hospital. Despite the fact that I have seen a lot of patients since that time, I feel competent to testify to what I found in this patient, as accurate as my memory permits me, without reference to my notes.

On that occasion, that examination, I found abrasions, no lacerations, and I found them on the inside of the legs. To the best of my recollection I made a note of that. I don't know whether that particular thing was included or not, but I made a note.

Q. In a case that important, wouldn't you make a note of everything you found in the patient?



Objection—sustained—defendant, in apt time, excepts—  
Exception No. 10.

I made a note of everything I found and considered significant. I didn't say whether I made it or not; to the best of my recollection, I did. I would have to refer to the notes to be absolutely sure. We are not afraid of these notes.

I did not make any other internal examination of her. We took a smear, which is routine for all cases of this type. When we took the smear, we were looking for male sperm. We did not find any. I recorded that in my notes. I did not examine all around the vulva; just one area. I made a complete examination to determine whether there was male sperm present, and I did not find any.

[fol. 73] I did not say I found a laceration on the inside of the legs. I say she had bruises on the inside of her legs. To the best of my recollection, I did make a notation of that in my record. (After examining the record): It is not written "inside of the leg." I made up those notes after her admission to the hospital, shortly after it. That is my record, on the second page. The page to which counsel refers is the final summary. That was attached to the sheets on admission to the hospital. The file grows both ways, from the back to the front and from the front to the back. In this case it grew both ways. The sheet to which counsel refers is the admission sheet; that was made at the time the patient was admitted into the hospital.

The second sheet, which is my report, June 16, 1950, is not necessarily the next thing that happened. They are the first notes I made, and they were made on the 16th. Those notes and pages are all kept together. I cannot explain why the first page appears shopworn and has a very visible oil spot on it right in the center and the spot does not appear on the second pages that were made by me on the day of entry of the patient and does not appear again until you get back into the record to the blood count sheets. I see that oil spot back in there again. I do not know how to account for that. The only opinion I have about why these pages are worn and the pages I made out are fresh, is that mine are covered up. I did not find some worn pages back inside of the record; I have not examined it.

(At request of counsel, the witness turned through the papers to the blood count records). There is not anything more than I would expect on any other chart; there is nothing unusual about that report, the way I see it. I don't see anything unusual about those sheets, nothing different in the sheets (referring to other sheets in the batch of papers). It would be my opinion that they were all made [fol. 74] in the usual course of things. When I examined her in the Emergency Room I noted that there were abrasions and bruises of the iliac crest. The iliac crest extends over a distance of about 6 or 7 inches, somewhere in the hip region. I recorded that.

Nobody instructed me to make a second examination. I don't recall that I, at any time, told Dr. Goswick what I found on my examination; he had my note there; I don't recall having told him. Dr. Goswick had access to the chart the entire time since her admission, and that would be the only way he would have to know what I found, unless I told him, and I did not tell him anything, to my recollection. I don't recall whether we talked it over or not. I can't remember whether I had any discussion with Dr. Goswick about it. I would not remember that as well as I would remember the technical details of my examination of this patient.

#### Re-direct examination.

Q. As a matter of fact, Dr. Dale, whenever a private physician is brought into a case, then the Assistant Residents in Surgery usually step aside and allow him to take over? Isn't that the practice there?

Objection—overruled—defendant, in apt time, excepts—  
Exception No: 11.

A. Yes, sir.

Q. Is that what you did in this case?

A. Yes, sir.

The front sheet, which counsel has asked me about repeatedly, represents what my findings were on my initial examination. My notes read: "Fracture, mandible, left (sub-condylar); fracture, skull, parietal right posterior; fracture, orbit, left with depression; fracture, zygoma, left;

lacerations multiple, scalp, face and both ears; laceration, hymen." "Laceration of hymen" was written down there on that sheet.

[fol. 75] R. O. DAUGHETY testified: I am the Administrator of the City Memorial Hospital. I have served in that capacity since December 1, 1949. As administrator, that record of Betty Jane Clifton, consisting of those two groups of papers, is under my supervision.

The summary or first sheet that is on both groups of papers is the admission record of the patient into the hospital, and the top, that has previously been had; that is typed in the admitting office. The balance of the sheet is filled in by the physician immediately in charge. He describes the condition on the form as short as possible. The record of each patient admitted to the hospital, as well as this case, is assembled through us, and its final form here is dictated on the basis of the American College of Surgeons standardization report.

This record was assembled consistent with the rules and regulations of the American College of Surgeons; the admission sheet first, the professional records, and the laboratory records, and so forth, in chronological order, as prescribed, with the nurses' notes in one group at the end of the record.

During the patient's stay in the hospital, that record is kept with the patient, if there is a private duty nurse in the room with the patient, or at the nurse's desk. In this particular instance, there were private duty nurses on until sometime in the first part of July. I do not recall when it was maintained in the patient's room. I would presume there was a table there with medicines and the records and everything else on it. It goes to our Medical Records Librarian, who assembles it.

#### Cross-examination.

I am Administrator at the City Memorial Hospital. I am not a physician. Dr. Goswick had instructions from me to make a vaginal examination on the 24th of June.

[fol. 76] I gave him those instructions because a part of my

duty is the supervision of the resident staff, and I explained to Dr. Goswick some time prior to his making that examination that I did not know whether the house officers would be present, whether Dr. Dale and Dr. Pearlman would be in the City of Winston-Salem at the time, and that it was his responsibility. In using "at the time," I mean at any time after July 1st, as their terms of office expired on July 1st. Dr. Pearlman is in Leaksville; there was another one, who is in California at the present time, and Dr. Dale stayed on as Resident in Surgery. Dr. Goswick was the attending surgeon in this case and I did not want the responsibility falling on my residents for any medical opinion or anything that comes along. That has been established in periods of time to be customary, that the attending physician is responsible for the care of that patient.

I requested Dr. Goswick—you can call it instructions—to make that examination so that it would relieve the hospital of the responsibility if anything should come about after their term of office expired. Dr. Dale is a resident and not the attending physician on that case. He is a physician, but he is under the supervision of the attending man on a private case. Dr. Dale is now the Resident physician over there, the Resident surgeon. I did not know whether he was going to be there on July 1st or not. I know his term of contract now is through June 30, 1951.

I cannot state exactly when I requested Dr. Goswick to make that report; it was some time prior to the time he made the examination. I have no record on that to which I can refer; I would not ordinarily make a record.

Those records are all made and kept under my supervision. Those particular records pertaining to Miss Clifton were kept under my supervision. Up until 9:30 yesterday morning those were the true and correct records of Betty [fol. 77] Jane Clifton. Those records all the time were kept under my supervision; they were signed out twice to my knowledge, once during the past week by Dr. Goswick, and some two weeks ago by Dr. Dale, I believe. I presume they were signed out for professional purposes; that is the only reason that we release those records for, and when the doctors request those, it is customary to let them have them, on their request. Then the records were subpoenaed



here in Court. Those records have never been out of my supervision.

I know generally what those records contain, not that specific record, but I know what records in general contain. I do not know what that record contains. I have seen parts of that record but not all of it. I could not qualify to say I know what is in the record; I know the content of the record. The last time I saw the content of the record was on Monday, this past Monday, and I believe I saw that record sometime after the discharge of Betty Jane Clifton, which date I cannot state, but in unusual cases of this type, where there is a possibility of litigation, compensation or any other type, it is for me to judge that the required portions of the record are present.

At the time that I requested Dr. Goswick to make the complete physical examination, it was reported to me—by which nurse, I cannot recall—that the record was not complete from the standpoint of the attending physician having made the actual examination. My job is to judge the record quantitatively, not qualitatively; in other words, if there is a note there, that is substantial, so far as I am concerned. I cannot question what the professional portion of that record may be, as long as it is there. There is no obligation on my part to see that the doctor writes a certain thing into a record as to what condition he finds on a patient; I do not make any judgment of quality. I made such judgment and pronouncement in this case and require [fol. 78] ment of Dr. Goswick because I have an obligation to my resident staff that in any item of unusual category, the attending physician must not only accept the note of the record, but he must make his own examination. I was informed that that was the case, and so informed Dr. Goswick. I did not verify the information, other than when I called Dr. Goswick he said he had not made one because of circumstances he felt would not be justified to make that examination, and I requested then, at that time, that when one could be made that it should be made in order to relieve the responsibility of our assistant resident.

I had not been instructed by the Police Department of Winston-Salem to get such a record and paper; I am certain of that.

I do not know the date of the month, I requested Dr. Goswick to make that report; I presume it was before that date.

BETTY JANE CLIFTON testified: My father is Thomas Clifton. I went to school last year at Reynolds High School. I was in the tenth grade last year and am to be in the eleventh grade this year. I am back in school at this time.

I remember getting up out of the bed and catching the bus on the early morning of June 16, 1950. I was going to the radio shop to look after it. I had been keeping my father's radio shop ever since I got out of school.

I have seen the billfold you hand me; it is mine. (Referring to contents of billfold): This picture here is my cousin; she married my cousin, Billy Clifton; and this is my brother, Douglas; and this is a boy that goes to the same school I do; and this is my library card I got out of the public library so I could check a book out; and this is my girl friend, who went to Reynolds last year but has [fol. 79] changed schools now; and this is my identification card.

On the morning of June 16th when I went to the radio shop, that pocketbook was on the left hand, in the top drawer, where I always kept the change. I placed it there after I got to the radio shop that morning, as I always did.

I remember going up there to the radio shop and sweeping the floor and cleaning up a little bit. Some time that day Mr. Grossman called me to the phone over at the record shop, said I was wanted on the telephone. Daddy had always told me to lock the door, but I just didn't think. I just rushed across the street and picked up the phone, and it sounded like a colored lady.

A. . . I just rushed across the street and picked up the phone and it sounded like a colored lady, asking if the radio was fixed.

Objection sustained, to what she said.

Q. Someone called you? Anyhow, you were called to the phone and someone said what?

A. She asked if her radio was fixed, a certain radio—I don't remember any names—and I told her I couldn't tell.

I'd have to be over at the radio shop to look on the ticket, you know. You can always tell on the ticket, see if it's fixed. I think she said; "Just let it go," or something.

Q. Said what?

Q. I think she said, "Just let it go." I don't quite remember.

Q. "Just let it go?"

A. Yes, sir.

Q. Then what happened?

A. Well, that is all I remember. I guess I hung the phone up and went on back to the shop.

[fol. 80] I don't remember hanging up the phone, but I guess I did. I don't remember anything that happened that day after I went to the telephone. I don't remember exactly when I waked up in the hospital. I remember when I was there, for I didn't know where I was at, and I happened to look up on the pillow case and saw "City Memorial Hospital," and decided that was where I was at. I thought I had been over there two weeks, and my mother said I had been over there six weeks. I didn't know how I got over there or anything.

I had some cuts on my head that I didn't have when I got up that morning and went to the shop. (Witness turned to let the jury see her condition). The cuts on my ear are some that I had after I waked up in the hospital, and one there in my hairline, which is real long and can be felt but not seen, and one on the other side of my head and under my chin, which is small; there is just one cut above my ear; I don't feel any over on the other side.

This key is the key to daddy's radio shop. I had not seen that key since that day up until it was shown me just then.

My jawbone was broken; it was real huge, but it has gone down a lot; it is still larger than it was when I went to the radio shop that morning.

#### Cross-examination.

I don't remember anything after I received the telephone call until I woke up in the hospital.

LESTER W. JOHNSON testified: On the day in question I worked there in the garage where I run a place. My garage faced on Trade St. The Clifton Radio Shop is built right in the corner of my garage; it comes out in it. The back of the Clifton Radio Shop backed up on the left wall [fol. 81] of my garage at the rear; it makes a corner in it, in the side of my garage; they corner at an "L". Mr. Clifton had put in a little fan up there, about a 12-inch opening, a circle, a ventilator that he used in his radio shop. The fan was similar to the ones in the back of the Courtroom, operating on the same principle, taking the air out of my place into his place.

I was there in my garage during the morning of the 16th of June 1950, in and out all the morning. During that morning I heard a woman scream three times, just a loud noise. I started to look through there but Mr. Dunlap beat me to the place, and that was all that I heard except just a radio playing, like usual. I did not look in there, because Mr. Dunlap got up there before I did, to the place to look in.

Q. And he (Mr. Dunlap) saw something?

A. He said he saw something, said the door was closed and they had gone off and left the radio playing. He said he saw the door closed.

Q. And had gone off and left the radio playing? Can you tell the jury what time that was?

A. Well, there was a fellow in there at that time said it was a quarter of 11 and he had to go move his car. That is all I know about the time. He had his car out there on the parking lot; he was standing there, said he had to go move his car, and he said it was a quarter to 11 o'clock.

Objection to what somebody said—sustained.

Q. To refresh your recollection—Was it a quarter of 12, sir?

A. Quarter to 12.

Q. Was it a quarter to 12 or quarter to 11?

A. Quarter to 11.

Q. You don't recall definitely what the hour was?

[fol. 82] A. No, I do not.



## Cross-examination.

According to my best recollection, it was a quarter to 11. I did not check the time.

Q. You had some way of fixing that time in your mind?

A. No. There was a fellow there, as it happened. He says, "It's a quarter till 11, and I've got to go move my car."

Q. I am not talking about what he said. In consequence of what he said to you, you fixed in your mind the time of 10:45 or quarter to 11? Is that right?

A. Yes. That happened at the same time he said that.

Q. That is when you say you heard three screams?

A. (The witness nodded his head).

Q. And got up?

A. (The witness nodded his head).

Q. Or started to that ventilator, to get up there, and someone else beat you there, and nothing was seen?

A. Correct.

JOSEPH ISIAH REDMAN testified: On the 16th of June of this year I was working for B. S. Orrell. We cut 250 boxes of bananas that morning till 12 o'clock. At lunch time I carried some laundry up to the Chinese laundry on Trade Street, and after I went to the laundry, it was time for me to go to dinner, I'll say between 12:30 and 1 o'clock, and [fol. 83] I was on my way to dinner, and I was going on out Trade, and then I had to turn to go out Oak Street. I had turned to go out Oak Street and Lynn Clyde was going out Oak Street in front of me. When I first saw Clyde he was right along there by that service station. I do not know where the Clifton Radio Shop is. Clyde was right there at the filling station on the corner of Trade and Seventh Streets, the one just across the street from Brown's Warehouse. Clyde was right there on the corner of Oak and Seventh Streets, over on the north side of Seventh Street. When I first saw Clyde I was right along there by the battery place.

Clyde had a small radio. I did not catch up with him there. I hollered and spoke to him. Clyde didn't say anything except asked me for a cigarette and I told him I

didn't have one. I asked him what did he want for the radio.

Q. How did he appear, Isiah, at the time you talked with him there?

Objection overruled and defendant, in apt time, excepts—  
Exception No. 12.

A. Oh, just like anybody else'd get off from work, going to dinner.

I never did catch up with him; he walked in front of me; I'll say he stayed in front of me a pretty good ways, something like from here to the second bench, something like 30 or 40 feet.

I have been knowing Clyde a pretty good while. Me and him used to work together at the next produce house, of Plemmons and Irvin. He walked on in front of me on out there to Eighth Street, and I stopped out there and was standing there talking to another fellow out there on the street, and he got out on Eighth Street, and he left, and I went to dinner. I wasn't in any hurry; I had a whole hour. I don't know which way he went when I got to 8th Street. I don't know if he stopped there on 8th Street; I can't say; [fol. 84] I went on out Oak; I did not see him any more after I got to 8th Street.

While I was walking there in front of the filling station with Clyde over on the corner, I did not see a pop truck pull up there.

The next time I saw Clyde was when I was going back to work. At that time I saw him down there on the railroad. I went down on Short Abattoir and Oak, to the house of a girl friend, for dinner. I don't know how long I was at her house. When I came back I came by the Winston Leaf House and by the White Sand, and I saw Clyde out there. I also saw Thomas Campbell and Roosevelt Peters there; they were on their way back to work. I didn't stand talk to Clyde at that time. Clyde didn't say nothing to me. I hollered at Clyde, but he didn't look around and say anything to me; he just kept walking. Nothing was said between me and Clyde on the White Sand. Clyde was coming on down like he was going home.

I had eaten lunch at my girl friend's house before I went

to the White Sand. I don't know how far it is from 7th and Trade to the White Sand or from the White Sand to where my girl friend lives.

### Cross-examination.

I saw Clyde by the filling station between 12:30 and 1 o'clock. I never leave the place I work 'till 12 o'clock, and sometimes it will be 5 minutes past 12. I had to go by the Chinese laundry, and there were people ahead of me at the laundry. Orrell's place is right in front of the Colonial Store on Fifth and Cherry, and I went down Cherry to Sixth Street and right up Sixth Street there to Trade to the laundry and came on out Trade to Seventh and turned on Seventh, west, to Oak, and that is where I saw Clyde Brown.

I did not get off at 12:30. I say I got off at 12 o'clock. If I get off at 12 I have to be back at 1:00. I got back to [fol. 85] work about a quarter past 1. I didn't know exactly what time it would be when I would get back, but when I got back I looked at the clock at Orrell's. I did not know I wasn't going to be late; I was just taking a chance on that.

I went down to my girl friend's house and ate lunch, took as much time as was necessary to get my lunch, and then I walked on back.

When I saw Clyde Brown on Oak Street it was between 12:30 and 1 o'clock. I didn't stay at my girl's house no longer than it took me to eat dinner; I don't know how long it took me, but it didn't take long; I'll say about 10 or 15 minutes. I walk back to work pretty fast, and it doesn't take me long; it is at least 22 minutes' good walk. It takes me about 22 minutes to walk from her house up to Orrell's store and it takes me about 22 minutes to walk from Orrell's store down to her house, if I go straight there, but if I have to stop, it takes a little longer. I was given an hour for my lunch time. I spent about 44 minutes walking backwards and forth, and I spent about 15 minutes at her home eating.

I saw Clyde Brown that day. He stayed in front of me about a distance of 30 or 40 feet. He was walking north on Oak Street and he just turned his head around.

Re-direct examination.

I got off from work at Orrell's at 12 o'clock and I went to the Chinese laundry. I went up to Brown-Rogers-Dixson Company earlier in the morning, but on this occasion I went to the Chinese laundry right there out from Pleasant's Hardware Store at the corner of Sixth and Trade Streets. I came down to Sixth Street and went up by the City Market, and then I turned down Trade Street to the Chinese laundry. Then after I left the Chinese laundry I walked on North on Trade Street, and when I got along down at Brown's Warehouse I saw Clyde right there at [fol. 86] the service station. Clyde was walking about like a man would going home for lunch, and about the time I got down to the corner he had gotten to the corner of Oak and Seventh Street, and I was over on the corner of Trade and Seventh. Then he walked on down Oak Street, going North, sort of in front of me. He just turned his head. Me and him didn't go out to Eighth Street together.

(Referring to a photograph): I can recognize one building and the church on Liberty Street in that picture, but I don't recognize the other places.

I was paying much attention to the way Clyde was dressed on that occasion and I can't hardly say how he was dressed.

Q. Do you remember what type of clothes he had on at all?

Objection—overruled—defendant, in apt time, excepts—Exception No. 13.

A. Well, he had on, I would say it was a pair of fatigue overalls or a pair of overall pants, something—

Q. Something of the sort?

A. It was something like pants, in the pants line, or something like that.

Q. You're not positive about what he had on?

A. No, sir, I am not.

Q. But that is your best recollection about it?

A. That is right..



## Re-cross examination.

I said I didn't recollect what he had on; that is something I don't pay attention to, what people are wearing when I am going home to lunch. I told the Solicitor to my knowledge what he had on. When I am walking, I walk with my head down most of the time, and I didn't pay all [fol. 87] that attention to the way it was. It was between overall fatigues and overall pants; it was in that line; I can't say it was dress pants; I believe they were sort of brown; I don't remember now whether they had cuffs on them or not; it looked like the same color as Army overall fatigues. He had on overalls; the clothes that he had on was brown. I never did get close enough to him to see whether they had big brown stripes or what on them; all I know they was brown. I don't remember what kind of shirt he had on. If I ain't mistaken, I think he had on a baseball cap; I don't remember now what color. I have told all I know about it. I think he had on a pair of brown slippers. I am not trying to reconstruct nothing in my mind. I remember now he had on a pair of tan slippers. I have told about the kind of pants he had on, to my knowledge, for I didn't pay all that much attention to it, because I thought he was coming from work. I didn't pay all that much attention to it. I noticed his shoes, because if you are walking along with your head down, the first thing you see is a pair of shoes a fellow is wearing. I am not saying that the only thing I saw about the person I identified as Clyde Brown was his shoes. I saw his face. He turned around, turned his head around. I can recall the overalls he had on. He had on a shirt, but I don't remember what color it was; it was in the sport shirt line; I don't know what color it was.

I do remember something about the person I saw that I identify here as being Clyde Brown. I do know that the person I saw was Clyde Brown. I used to work with Clyde and I know him.

I did not say I walked down to Eighth Street with him. I said the time I got to Eighth Street he was gone. I said I stopped out there. I said I walked down Oak Street from Seventh to Eighth going North on Oak Street. That is a

long block. I have worked with Clyde Brown and know him very well. I was walking about 30 feet behind him. [fol. 88] I walked with him out to the next building out there and was stopped and talking to a man out there.

Re-direct examination.

When I saw him on Oak Street, it was Clyde, and the man I saw over on the White Sand was Clyde. Thomas Campbell and Roosevelt Peters were there, too; they were on their way back to work. I knew Thomas and Roosevelt.

I have told what kind of clothes he had on to the best of my recollection.

(At this point in the trial the Noon recess was taken, with the Court instructing the jury as follows: "Gentlemen, remember the caution I have heretofore given you. Don't discuss this case among yourselves or allow anyone to talk to you about it. Wait until you have heard all the evidence, the argument of the counsel, and the charge of the Court before you make up your minds.")

At 1:45 P. M. of the same day the proceedings were continued, as follows:

ROOSEVELT PETERS testified: On the 16th day of June, I was working at Plemmons and Irvin, a wholesale produce establishment on Cherry and Sixth Streets. I knew Tom Campbell on that date. Tom and I both worked down there. Tom and I lived on West 12½ Street at that time. Tom and I went to lunch that day and I saw Clyde Brown on my way back, right there on the White Sand under that lifter they have got down there. I just passed him there and he had a radio in this hand; I asked him to play it and he said it wouldn't play, so we kept going on. At the time I passed him I reckon he was about as far as from here over to that banister from me (7.5 feet). We just slowed down and then moved on. I didn't notice nothing about [fol. 89] his clothing, but he had on a bluish looking shirt and it looked like to me he had on a chauffeur cap.

I go to lunch right along about five or ten minutes of twelve; no fixed time.

### Cross-examination.

The White Sand is right off of Cherry St. It is a big yard they have got there where they unload cars and things. You can come up off of Cherry to the place there. From 16th Street you can go across there and hit 12½ Street. I live on 12½ Street.

I got off about five or ten minutes to twelve o'clock and the truck driver down there brought me and Tom Campbell home on the truck. When I saw Clyde it was around about 12:25. I was with Tom Campbell at that time. Tom Campbell is in the courtroom. Tom lives at 345 West 12½ Street. Tom works with me at Plemmons and Irvin's.

The man I saw and who I identify as Clyde Brown had on a chauffeur's cap and a bluish looking shirt, to my knowings; it was some kind of a little old shirt like the one I have on. (The witness was wearing a sport shirt.) I didn't pay no attention to the pants he was wearing because he was kind of off from me, over in the weeds there. I didn't see his shoes.

It was right along about 12:25 I saw him. I know Clyde Brown. I have known him ever since I have been on 12½ Street, and that has been a good while.

I have never been in no kind of trouble. I have been in Court for not going to school, playing hooky. I have been down there when me and my wife had a little scuffle, when we were fighting; she said I hit her with a chair; I hit her with a chair to keep her off of me. My wife has had me up just one time. I have been up one time for lareeny; I didn't get no time for that; I got a beating, got whipped. That is all I can think of I have been up for. I did not say I [fol. 90] had not been up for anything at all. I know there ain't nothing else I have been up for.

### Re-direct-examination.

It was pretty close to 12:25 when I saw him. I know I went home at five or ten minutes to twelve.

THOMAS CAMPBELL testified: I know the defendant, Clyde Brown; I have known him around three or four years.

On the 16th of June, of this year, I was working at Plemmons and Irvin's, wholesale food produce, and was living at 345 West 12½ Street. I went to lunch with Roosevelt Peters.

I saw the defendant, Clyde Brown, on the White Sand on my way back to work. I did not stop and talk with him. He had a little hand radio in his hand, a little grey hand radio. I didn't pay no attention to the kind of clothing he was wearing. I estimate that I saw him there about 12:25 or 12:30; I don't know the exact time; I estimate it was between 12:30 and 12:25.

#### Cross-examination.

I went to lunch on the 15th of June, about 11:55. On the 16th of June I went about 11:50. I have a watch. My watch was broke, wasn't running then. I know it was 11:50 because we have a time clock and I have to punch the clock. The reason I know what I time I got back to work is because we rode home on the truck. The boy that carried us home told us he was going to wait on us 15 minutes, and we were trying to get back down there after we went home and ate. I estimate it was about between 12:25 and 12:30 when we got back down there.

I was riding on a truck going back. We caught the truck right off the White Sand up there. The White Sand is right off of Cherry Street. I estimate the time as 12:25 or 12:30. I have not been doing a lot of talking about this. All I have talked is what I have heard and read in the paper. [fol. 91] I am not making up my mind. They carried me down there for investigation about this, asking me questions about it.

I don't remember what time I went to lunch on the 17th of June or went to lunch and returned to work on the 18th of June. I can't remember the time I went to lunch and returned on the 14th of June. I remember the time I went to lunch and returned on the 16th of June because we had a certain amount of tomatoes to run out, a certain amount of boxes of tomatoes to run out. That was on the 16th or the 15th of June, I am not certain which. That is how I



fix the time, is on the occasion on which I had all those tomatoes to run out. It was on the 16th of June, when I went home that Friday. I just said I am arriving at the date from the fact that I had a lot of tomatoes to run out. I know we were supposed to run them out on Thursday evening, but we didn't finish. I can remember that Monday in connection with going to lunch and coming back to work, the Monday after the 16th. I can't remember the Monday before the 16th. I can't remember what time I left for lunch and what time I returned to work on the 13th of June. I can remember what time I left on the 16th; I don't know what time I got back. I saw the man I identify as Clyde Brown between 12:25 and 12:30.

I haven't agreed to anything with Roosevelt Peters; we know what time we are supposed to get back.

I have been up for gambling, whisky, larceny, and nuisance. I have been up for whisky one time; larceny, once; haven't been up for fighting; gambling, once—up twice, but I served time once. I served 60 days for larceny. I have not been up for fornication and adultery.

#### Re-direct examination.

We had to run the tomatoes that Friday. It was the day I ran the tomatoes that I saw him on the White Sand.

[fol. 92] M. W. WILSON testified: On the 16th day of June I was working at the Fowler Furniture Company, 609 North Liberty Street. I do not know where the Clifton Radio Shop was on that occasion; I do not know where it is now. Fowler Furniture Company is between the 600 and 700 block on Liberty Street.

I saw the defendant, Clyde Brown, on that day two times. I saw him just before Noon. It was about an hour between the two visits, and the last visit was shortly before 12:00 because we have two employees that go to lunch at 12:00. The first time, Clyde Brown came in with a small portable radio, wanting it to be repaired. He had bought it previously from us, earlier in the year. I do not recall how he was dressed on that occasion.

Those two visits were the only two times I have ever seen him since. On the second visit he came back to pick up his portable, with the statement that he had some one else to repair it. He took the portable with him that time.

W. F. REID testified: I am a police officer of the City of Winston-Salem, assigned to the Detective Division, and I was serving in that capacity on the 16th day of June of 1950.

A call came into the Station to which I responded sometime around the Noon hour, about 12:25. Pursuant to that call I went to the Clifton Radio Shop on Seventh Street, arriving there about 12:30, or 12:28, or 12:29. I was about two or three minutes getting there.

When I arrived there I saw a crowd around the front, and Officer Combs was trying to handle the crowd and keep them out of the Radio Shop. Officer Combs was standing just inside the door of the shop, keeping everybody out. No one else was in the shop at that time. Betty Jane Clifton had already been removed at that time, and her father was not there. I glanced in the shop and then asked Mr. Combs to keep everybody out, and I hurried on to [fol. 93] the City Hospital. I asked Officer Combs to keep everybody out until other officers arrived.

When I arrived at the Emergency Room at the City Hospital I found in the Emergency Room a young lady on the table in there and Dr. Dale and another doctor of the hospital staff and two or three nurses working with her. I learned that that young lady was Betty Jane Clifton, while I was there. Betty Jane was badly beaten about the head and face and her eyes were completely swollen together and she had a lot of blood in her hair and on her face and on her clothing and she apparently was unconscious at that time. I talked with Dr. Dale before I left the hospital.

Q. What did he (Dr. Dale) tell you, Mr. Reid, with reference to her injuries?

Objection; overruled, and defendant, in apt time excepts  
—Exception No. 14.

The Court: Gentlemen of the jury, this is offered for the purpose of corroborating Dr. Dale, if you find it does corroborate him, and for that purpose only. It is not substantive testimony.

A. Dr. Dale stated that the girl was in a very serious condition and apparently, in his opinion, was fast slipping. He stated that he was of the opinion at that time she had a fractured skull and that she had a fractured jawbone and that she was very badly beaten and that her condition was very serious at that time.

Q. Did he make any statement to you at that time or at a later time about any vaginal or female organ wound?

A. Yes, sir. I asked Dr. Dale before I left the hospital if the girl had been criminally assaulted.

[fol. 94] Objection; overruled, and defendant, in apt time, excepts—Exception No. 15.

Q. What did he tell you?

A. At that time he stated that at the time she was admitted to the Emergency Room that she was bleeding freely at her private, and that she did have a laceration.

Q. Did have a laceration?

A. Yes, sir, and that her condition, though, was too serious at that time to go any further with that examination.

I stayed at the hospital approximately four hours from the time I arrived there. During the time I was there, one of the nurses, in my presence, took scrapings of the young lady's fingernails and they also took her clothes and it was all sealed up and handed to me and I left there and came back to the Police Station around 4:20 P. M.

Sometime later I saw the defendant Brown in Captain Burke's office at the City Hall. The first time I saw Brown was on the 19th of June, at approximately 4:00 o'clock in the evening, the Monday after I had seen Betty Jane Clifton on Friday in the City Memorial Hospital. Capt. Burke's office is not in the jail; it is on the second floor of City Hall. At the time I walked in the office, Capt. Burke, Mr. Adams, Clyde Brown, and two or three officers were there in the office, and they were talking with Brown when I walked in.

Q. I want you to tell the jury what Brown told you?

Objection.

The Court: Gentlemen of the Jury, you may step out to your room.

(In the absence of the jury the following proceedings were had:)

Mr. Price: If your Honor please, I take it the question [fol. 95] Mr. Johnston is asking is leading up to some statement or confession made by the defendant, some statement that purports to be a confession, and I certainly think that we are entitled to a preliminary examination as to whether it was a voluntary statement or not.

The Court: Absolutely. Go ahead. That is the reason I sent the jury out.

The Solicitor: If your Honor please, I might make this further statement: that this is one of a series of statements.

The Court: Let's go into all of the statements while the jury is out.

The Solicitor: All right, sir.

Mr. Price: How many statements are there, Mr. Solicitor?

The Solicitor: Well, sir, we will go into them in a systematic way.

Mr. Price: All right. Mr. Reid, you say that the first time you saw —

The Solicitor: Now, your Honor, I believe I can qualify him and then permit the counsel to cross-examine him, with your Honor's approval.

The Court: Let him go ahead, and then you can take him back.

The Solicitor: All right, sir.

The Court: Go ahead.

Examination of Mr. Reid by Mr. Price, in the absence of the jury.

The first time I saw Clyde Brown was on Monday, the 19th, around 4:00 o'clock, in Capt. Burke's office. He was [fol. 96] arrested that same day early, around 12:25 or 12:30 that same morning. This was 4:00 o'clock in the afternoon. No, I was not present. That is a record I am quoting. The time he was arrested was registered, but I



was not present when he was arrested. I do not know what was said to the defendant in the way of advising him as to his rights, between 12:30, the time he was taken into custody, and the time I first saw him.

Further examination of Mr. Reid by Solicitor, in the absence of the jury.

On the first occasion I saw Clyde Brown around 4:00 o'clock on Monday afternoon, Capt. Burke was present and Mr. Adams was there, and I recall Capt. Burke telling Clyde on that occasion there that it would be necessary for us to talk with him regarding the assault on Betty Jane Clifton; however, he was not accused of this crime, and that he did not have to make a statement; that due to certain information that he (Capt. Burke) had received, that it was going to be necessary for us to talk with him; that he, Clyde Brown, did not have to say anything; that he was allowed, and would be allowed counsel and the advice of counsel before making any statement. At no time did anyone place Clyde in any fear or threaten him, and at no time was any offer of immunity given to him, or any hope of reward, or any suggestion made to him that he had anything to gain whatever by making a statement. Capt. Burke further advised him that any statement which he might make might be used against him in court, or it might be used for him in court. The next time I talked with Clyde Brown was about 9:30 P. M. the same day, and he was again warned, as he was warned every time I talked to him, by Capt. Burke and other officers. He was told about his right to counsel. He was told that he did not have to make a statement. He was told that any statement he made would be thoroughly checked. He was told that any statement he might make might be used against him or for him [fol. 97] in court. He was also told that he had the right to counsel's advice before making a statement.

He was never placed in any fear in any of the meetings or talks I had with him, nor was he threatened or placed in any compulsion of any sort, and he was never offered any reward or hope of reward, or immunity, or promise or suggestion that he had anything to gain by making any statement. On each occasion I talked with him we were

in the offices of the Detective Division, and most of the time in Captain Burke's office. The Detective Division Offices are not in the jail; they are on the second floor of the City Hall. They are entirely open to the public.

During his (Clyde Brown's) stay there he was allowed visitors. I know that Mattie Mae Mitchell, his girl friend, came to see him. She was allowed to see him each time she came down there while I was on duty, or while Mr. Carter was on duty. Augusta Henry also came to see him. Clyde Brown asked for Augusta Henry, and the Police Department located Augusta Henry and brought him up there. During his (Clyde Brown's) stay in jail, counsel came to see him. Counsel went up in the jail and talked with him, but I don't recall the exact date that counsel talked with Clyde. The longest period of time that he was talked to on any occasion, to my knowledge, was not more than two hours. Yes, any time during the times we were talking to him when he would tell us he would like to stop the conversation, we stopped and respected his request. He was allowed to smoke, and if he asked us to stop the conversation and let him go back to jail, we would take him back. We gave him a cigarette every time he asked for one.

Re-examination of Mr. Reid by Mr. Price, still in absence of the jury.

Yes, Capt. Burke told him that he would have the benefit of counsel. Yes, I heard Captain Burke tell him that the first time I talked to Clyde Brown. This was on the 19th of June, and that was my first occasion to question Clyde at all. No, I know of no effort on the part of Capt. Burke or anyone else to connect him with counsel, other than tell him that he could have the advice of counsel before making a statement if he wanted one. No, he never told me he was not able to have a lawyer. I never heard Clyde say anything about wanting a lawyer at any time. The different times I talked with him, I never heard him say anything about wanting a lawyer.

To my knowledge, no offer was ever made to get Clyde Brown a lawyer, nor was any offer made to phone for whatever lawyer he wanted; but he never did ask for one,

nor did he ever ask us to get one for him. I don't recall whether the first time he talked with a lawyer was after he had been formally charged with this offense or not because I don't recall what day he did talk with his lawyer. I do know I was there in the building when the lawyer came out from up there and talked with him. I do not recall the lawyer's name. He was a colored lawyer. No, he was not questioned from sometime in the afternoon until sometime around 8:00 or 9:00 o'clock at night. He was questioned the first time until about 5:00 o'clock, and then locked back up. And then he was talked with later on around 9:00 or 9:15 that same night.

We only kept him under questioning about an hour, to my knowledge. We were trying to solve this crime. We were talking to Clyde and asking him questions, and he was talking to us and answering our questions, most of them. To the best of my knowledge, we only questioned him one time in a day, except the first day, and that was on June 19. On that occasion, we questioned him for an hour to two hours, not more than two hours either time. Yes, we questioned him again at night. After the first questioning, we went out to check his story, and then we went back and talked to him again. We made a formal [fol. 99] charge against Clyde on June 24. I had not questioned him every day between June 19 and June 24, according to my best knowledge. I questioned him not more than five times from the time he was arrested to the time he was charged. I don't know whether or not Clyde Brown was carried before the Judge of the Municipal Court on July 7, because I was away on my vacation when he was given a hearing in court, but he was not given a hearing before I left for my vacation, and I left for my vacation on July 6th, 5th or 6th. Clyde Brown had been in custody all the time from June 19th until July 6th.

Re-examination of Mr. Reid by Solicitor, still in absence of jury.

When I was in Capt. Burke's office on Monday afternoon, talking with Clyde Brown, Clyde was asked by Capt. Burke about his whereabouts on that night. He stated that he spent the night with Mattie Mitchell, his girl friend,

down on Wilson Street where they lived. He asked him about Thursday night and Friday morning. He said he spent the night with his girl friend, Mattie Mitchell. He also stated that he came downtown about 9:00 o'clock that morning; that he left his home about 9:00 o'clock and came downtown with a small portable radio; said he went in Clifton's Radio Shop on Seventh Street to see about getting the radio repaired; that he was informed there that they did not fix radios in the daytime; that the man fixed radios at night; that he was informed by the white girl that works in there. He stated then he went on over to Fowler's Furniture Store. He stated that the shoes he was wearing on this particular day he bought them brown and had dyed them on Saturday. I don't recall the exact day that he said he bought the shoes, but they were right new. He stated that he usually bought his shoes tan and usually dyed them black. I did not check what he told us, but I was there and heard him questioned, after Captain Burke and other officers did check what he said. That [fol. 100] was later on that night around 9:00 or 9:15 o'clock. Clyde was warned of his rights at that time. He was warned all along of his rights. Yes, he was told what he was being questioned about in the beginning. He was not placed in any fear, or threatened, nor was any offer of any immunity or hope of reward made to him on that occasion.

The Court: Mr. Reid, was there ever any physical violence, threat of violence used on this defendant?

A. No, sir. Absolutely not, sir.

The Court: Was he ever physically mistreated in any manner?

A. No, sir. Absolutely not. Not a bit more than he is in this courtroom now; not a bit.

The Court: All right, go ahead.

Q. What did he tell you then, Mr. Reid? What was the conversation on that occasion?

A. Well, practically the same thing that the first statement was. He contended that he didn't stay at home that night, as he stated; that he just stayed up all night and walked around; that he didn't go to bed. Capt. Burke in-



formed him that his investigation revealed, after checking with his story, that he didn't spend the night as he said. After being confronted with those facts, then he stated that he didn't go to bed that night, that he stayed up and just walked around all night.

Mr. Price: If your Honor please, I am a little bit confused. Are you stating, Mr. Reid, what Capt. Burke's investigation revealed, or what the defendant told?

A. I am stating what was said when Captain Burke was questioning Brown; what Brown would say back to him to the questions.

Clyde was next talked to the next day; it was around 3:00 o'clock, I believe. He was talked to on that occasion from one to two hours, but he was not threatened. At that time his girl friend Mattie Mitchell was present in the office. [fol. 101] On that occasion the subject of conversation was the way Clyde Brown claimed that he was dressed. You know, he had told Capt. Burke that he was dressed wearing certain clothing, and that he left her house at 9:00 o'clock; and she was there in the office and stated in his presence that it was not 9:00 o'clock when he left, but around 11:00 o'clock, and that he was not wearing the clothing he said he was wearing, but that he was wearing different clothing. His girl friend was there and confronted him with those facts.

Well, at that time, of course—You don't want to hear his statement that he made at that time? At that time he did change his story then, and stated that he did leave home, as Mattie Maed said, about 11 o'clock, or shortly after, and that he was wearing the clothes that she said he was wearing when he left, and that he was wearing the clothes she said he was wearing when he come back, and that he stated that he did go from the house, that he left on that morning wearing a long-sleeved black wool shirt and an old pair of raggedy overalls; that he went on to his mother's house, on 12½ St., where he changed clothes, and that he went on then to uptown with this little radio; that he went to Clifton's Radio Shop and that the little girl in the radio shop was in there alone when he walked in, and that he asked about getting this little radio fixed, and

of course he was informed by her that they didn't work on radios in the daytime; that her father worked on radios at night, and that as he came out of the door he met a colored man going in the radio shop, and that he went on around to Fowler's Furniture Store, which is around the corner on Liberty Street, and left this little radio to be repaired in there. He stated that he went from there down around the City Market and was gone a short time and went back by the Fowler Furniture Store and picked up this little radio and went back up Liberty Street to 7th Street, and on back by the radio shop, and as he got near the radio shop he stated that he heard a woman scream in the radio [fol. 102] shop; as he got on in front, even with the radio shop, he heard a radio fall on the floor; that he looked in and didn't see anyone, but he kept walking, never did stop; he walked on down to the corner of 7th and Trade Streets; that he stopped there and he got to studying about it, and he stated that something must be wrong in the radio shop; so he turned and went back, and as he started back towards the radio shop, he got about half way from the corner to the door and this same man that he met going in the radio shop came out and started walking, meeting him; that the man walked a few steps towards him and looked up and saw him; that he immediately turned around and walked east on 7th Street to Liberty Street, where he turned north and disappeared north, in the direction of a service station up there; and that he, at that time, he noticed the door being cracked open just a little bit to the radio shop. Clyde stated that he pushed this door on back a little bit and stepped inside; that he heard a groaning and struggling noise at the back of the radio shop; that he thought, he realized that there was something wrong.

He stated that he immediately come out of the radio shop and started walking back west on 7th Street to Oak, and he stated as he was crossing Trade Street on 7th, going in the direction of Oak, why he seen a boy he known as Isaiah, that he worked at Orrell's place, and that he spoke to Isaiah; that Isaiah asked him what he'd take for that radio and offered him \$18.00, said, "I'll give you eighteen." He stated he said back to him, "Make it ten." He stated that he kept walking on Oak Street, north, and Isaiah followed

him all the way to Cherry Street, and at that time he turned west on 8th Street and on down to Cherry Street and up across the White Sand and back home, and that Isaiah went straight on out Oak Street.

The next time I talked with Clyde Brown, I recall, was after Capt. Burke read the warrants to Clyde Brown. I [fol. 103] was present when the warrants were read to him. That was on the 24th of June. After Capt. Burke read the warrants, Clyde was again warned of his rights as I have already described. Yes, Mr. Carter warned him of his rights at that time. I was present, Mr. Carter and myself, and after Capt. Burke read these two warrants to Clyde, Capt. Burke left the office and left City Hall. It was around noon on the 24th. Clyde at that time made a statement to Mr. Carter and myself, and told us just what did actually happen.

I talked to him again on Sunday following this. Mattie Mae Mitchell came down to the City Hall and contacted Mr. Carter and myself, and wanted to see Clyde. I don't recall whether we went and got Mattie Mae. Anyhow, she wanted to see him, and we carried her up in the jail and let her see Clyde. We got him out of the jail and over in the kitchen or serving room up there where Mattie Mae and Clyde talked.

Mattie Mae Mitchell said to him during the conversation, "Clyde, where are those clothes you were wearing?" He said back to her, in a low tone of voice, "In the old liquor stash," and wanted to know if she knew where it was, and she shook her head "yes." Yes, that was where the pants were. Now, he first stated before he would tell her where they was, he wanted to know if we would let Mattie Mae herself go to this place and get these pants where he had them hid, and we agreed to let her get them, but we stated that we would have to go with her, and that is when he told her where they were, and she shook her head that she knew.

In consequence of that information, we went with Mattie Mae Mitchell down to his mother's, where the pants were. Now, the pants, of course, Mattie Mae herself, after we arrived down there, we noticed Mattie Mae—we looked around and Mattie Mae had a pair of pants under her arm, walking down between two houses, and we asked Mattie Mae if she

would show us where she got these pants, which she did, [fol. 104] It was next door to his mother's house in the floor of a toilet that was on the back porch, and they were wrapped in old newspaper, and the newspapers were damp, and there were other newspapers in this same trap. They were also damp. These are the same pants that were turned over to the FBI.

We next talked with Brown then on Monday. We were called to the Station. We got a radio message to come to the Station, and after arriving at the Station, Mr. Carter and I learned that Clyde had been asking to talk with us, and that he sent for us two different times; that Sgt. Tillotson, the jailer, came down and delivered the message that he wanted to speak to Mr. Carter and myself. At that time we went up and got Clyde, brought him down to the Detectives' office 213. He was warned all along as to his rights, and that he did not have to make a statement, and we warned him again this time, on Monday, of his rights, and that he did not have to make a statement. As I recall, Mr. Carter warned him, and I know I did on this occasion (Monday). He was in no way threatened, or placed in any fear, or coerced on that occasion; and we did not offer him any immunity, or any reward, or any hope of reward. We also told him that he could have counsel before he made any statement; that he had the right to counsel.

Re-examination of Mr. Reid by Mr. Price, the jury still out:

Q. Mr. Reid, were you present when one of the officers—I forget which one—told the defendant that if he didn't tell the truth about this matter they were going to put his mother in jail? Do you know anything about that?

A. I don't recall a question like that, no.

Q. You were not there? Well, were you present most of the time when he was questioned?

A. Well, most of the time I believe I was.

Q. You were never present when a statement anything like that was made to him, about putting his mother in jail [fol. 105] until he talked?

A. No.



Q. Were you present at any time when one of the officers told him that "we might just as well take this fellow back upstairs and lock him up, because he is not going to tell the truth about this thing," or something like that, "keep him there till he talks"?

A. No, I don't remember any statement like that.

Q. You don't remember anything like that? You say that every time you questioned him that he was warned, advised of his rights, warned that anything he said might be used against him?

A. Yes, sir. He was warned of that during every conversation that I heard with him.

Q. Even down to this last statement that you started to tell about a moment ago?

A. Yes, sir. He was warned of his rights.

Q. And when you and Mr. Carter came back in off the field and went to him in response to summoning from Sgt. Tillotson, you say that you told him on that occasion that whatever he said might be used against him, and that he didn't have to make a statement if he did not want to?

A. Yes, sir.

Q. On that occasion you did?

A. Yes, sir.

Q. Did you go to his mother's home and pick up his mother and carry her down to headquarters one time?

A. No, I don't believe I did.

Q. Well, you know she was down there once?

A. I know I went down there after her once and she was sick in bed. I don't know whether she—I think she was down there probably a time or two.

Q. Were you not present?

A. I won't be sure about that. I don't recall if I was.

Q. Well, wouldn't that sort of stick in your memory, if this boy's mother was down there and you questioned her any? How would you overlook that, Mr. Reid?

[fol. 106] A. I don't recall her being questioned any down there.

Q. But you do recall that she was down there?

A. No, I do not.

Q. Well, did you ever give him any opportunity to see his mother?

A. I went once after his mother, to let him see her, and she was sick in bed, said she couldn't get up, said she couldn't go.

Q. Well, Mr. Reid, when you went after her, or some officer, they carried her down there, didn't they?

A. Well, that I don't know. I wasn't along at the time she was carried down there, that I recall anything about.

Q. You just don't recall ever seeing her down there?

A. I don't recall seeing her down there.

Q. Clyde told you several times he wanted to talk with his mother, didn't he?

A. How is that?

Q. I say Clyde told you several times he wanted to talk with his mother, didn't he?

A. No. No, I don't recall Clyde ever telling me he wanted to talk with his mother, now. He kept wanting to see the Mitchell girl, his girl friend, and then I did make several arrangements for him to see her. I don't recall Clyde ever telling me he wanted to talk to his mother.

Q. Mr. Reid, you never had the Mitchell girl down there to talk with Clyde where Clyde could talk with her privately, did you?

A. Well, not—he could talk with her there in the room, just in the room where, of course, we couldn't go out, you know, and leave. She never did talk with him in jail. She talked with him most of the time in Capt. Burke's office, or one of the offices there, and there was high windows to all of them, to the offices, and the doors were not locked.

Q. You were always present?

A. And there was someone in there all the time that she would talk with him.

Q. And you, yourself, you don't recall ever giving Clyde [fol. 107] Brown an opportunity to talk with his mother?

A. No, I don't, myself, because I don't recall Clyde ever telling me he wanted to see his mother.

Mr. Price: I think that is all, if your Honor pleases.

The Solicitor: No further questions.

The Court: Do you have any other testimony you want to offer on this question?

Mr. Price: Yes, sir. I'd like to put the defendant on the stand.

CLYDE BROWN, first duly sworn, testified (in the absence of the jury):

Examination by Mr. Price:

Q. Clyde Brown, you, as the defendant in this case, are being examined, the purpose of this examination is simply to determine the preliminary question of whether or not you were properly advised and warned before you made any statement, if you made any statement to the Police officers. So it will deal only and solely with the time you were confined in the jail. Do you understand that?

A. Yes, sir.

Q. With that in mind, when were you taken into custody?

A. Sunday night.

Q. When were you taken into custody, Clyde?

A. That Sunday night.

Q. That was the Sunday night after the 16th of June?

Is that right?

A. Yes, sir.

Q. What time?

A. It must have been about one o'clock or some after one.

Q. One o'clock?

A. Something like that.

Q. Where were you at the time the officers picked you up?

[fol. 108] A. I was down at Mattie's house.

Q. Where is Mattie's house?

A. 1318 Wilson Street.

Q. And you say it was about one o'clock?

A. Yes, sir.

Q. Now, you were carried to Police Headquarters at one o'clock Sunday morning? That would be Monday morning, is that right?

A. Yes, sir.

Q. Did the officers lock you up immediately, carry you up in the jail lock?

A. They carried me upstairs and put me in jail up there.

Q. Were you questioned before you were locked up?

A. No, sir.

Q. When was the first time you were questioned after you were taken into custody?

A. That Monday evening.

Q. Monday evening? About what time?

A. Must have been about 4:30 or 5 o'clock.

Q. About what time?

A. About 4:30 or 5:00 o'clock.

Q. Who was present?

A. I don't know their names.

Q. Do you recognize any of the officers? Was this gentleman here, Mr. Reid, who was on the stand a moment ago, was he present?

A. He came in later.

Q. Was Capt. Burke there, this gentleman sitting here next to the Solicitor?

A. Yes, sir, he was there.

Q. He was there?

A. Yes, sir.

Q. Do you recognize any other officers? Was Mr. Adams present?

A. Yes, sir.

Q. Was Mr. Carter present, the man sitting behind the Solicitor?

A. No, sir, I don't think he was.

Q. You don't recall seeing him? Now, you say that was about 4:00 o'clock in the afternoon?

A. Yes, sir, something like that.

Q. What, if anything, did they say to you? Did they advise you or warn you, advise you as to your rights or [fol. 109] warn you that anything you'd say might be used against you?

A. Not the first time.

Q. They just started asking you questions about it?

A. Yes, sir.

Q. What did they ask you?

A. I asked them—I told them I wanted to go home, and they told me they was going to let me go home, they just wanted to ask me a few questions. So they started asking me a question, about where I was and where I stayed at.

Q. Did you answer their questions for them?

A. Yes, sir, what I could answer.

Q. There was no statement made to you, you say?

A. No, sir, not then.



Q. Was any offer made to you to get a lawyer for you?

A. No, sir.

Q. Did you ask the privilege of the officers to talk to anyone?

A. Mattie. I asked them to talk to Mattie.

Q. You told them you wanted to talk to Mattie?

A. Yes, sir.

Q. When was that?

A. That was after they questioned me about the second time.

Q. About the second time?

A. Yes, sir.

Q. Did the officers at any time tell you that you would have the benefit of counsel or could have the benefit of counsel before making any statement, and that you did not have to make a statement if you didn't want to, and that anything you said might be used against you?

A. They told me that twice.

Q. Told you that on two occasions?

A. Yes, sir.

Q. Before they started questioning you?

A. (The witness nodded his head.)

Q. Now, can you tell us when those occasions were, what dates they were? Was it the second, third or fourth time after you were taken into custody, or after the first questioning, rather?

A. I think it was the second questioning.

[fol. 110] Q. They didn't make any offer to you to provide you with counsel or to apprise you of your rights the first time they questioned you? Is that what you said?

A. No, sir.

Q. Now, what about the second time?

A. They did the second time.

Q. They did the second time?

A. Yes, sir.

Q. Now, what about the third time?

A. No, sir, not—I don't think they asked me the third time.

Q. How many times in all were you questioned?

A. About five or six times.

Q. How long would the officers question you on each occasion?

A. They would carry me down there in the evenings, late over in the evenings, and I'd be there till after dark.

Q. Till after dark. Now Clyde, without going into what you told the officers or anything: On this last occasion, the last time you made a statement to the Police Department, were you warned at that time?

A. Yes, sir.

Q. I am talking about the time that Mr. Reid—  
Solicitor: I object, your Honor. He has answered it.  
Court: Go ahead.

Q. Were you advised of your rights before you made any statement there?

A. Not before.

Q. Not before you made the statement?

A. No, sir.

Q. You say it was four or five times they questioned you?

A. No, sir, about six or seven, something like that.

Q. Six or seven?

A. Yes, sir.

Q. You had been questioned about how many times before the officers came down and read a warrant to you and told you you were formally charged with certain offenses? [for: 111] A. Sir?

Q. About how many times had you been questioned before the officers came down and read a warrant to you and told you that you had been formally charged with the offense, the crime of rape, and assault with intent to kill?

A. About four times.

Q. Four times?

A. Yes, sir.

Q. You had been questioned all four—was that on four separate days?

A. Yes, they was on separate days.

Q. On four occasions, and they were four separate days. Is that it?

A. Yes, sir.

Q. And the first day was on the 19th?

A. (No answer.)

Mr. Price: Go ahead.

Examination of Clyde Brown by Solicitor, jury  
still out.

Q. Clyde, you were picked up and talked with on Monday afternoon, the first time, weren't you?

A. Yes, sir.

Q. At that time, Capt. Burke, this gentleman right here, and Mr. Reid and Mr. Carter were present? They all were there and talked with you, weren't they?

A. The first time?

Q. Yes, on Monday afternoon?

A. No, sir, not—Mr. Carter wasn't there.

Q. Mr. Carter wasn't there?

A. No, sir.

Q. But you recall Capt. Burke telling you that he was going to find it necessary to ask you some questions about this crime that had been committed up there, didn't he?

A. Yes, sir.

Q. You recall him telling you that he was going to have to check your story? You remember that, don't you?

A. Yes, sir.

Q. And you recall him telling you that you had the right to a lawyer, if you wanted it; that any statement—that you had a right to make a statement, if you wanted to? You remember that, don't you?

[fol. 112] A. No, sir.

Q. You don't remember that?

A. No, sir.

Q. You don't deny that he said it, do you? What?

A. I don't, nothing about no lawyer, I don't.

Q. You don't deny he said it, do you?

A. He didn't say nothing about no lawyer.

Q. What?

A. He didn't say nothing about no lawyer.

Q. You don't say that he didn't tell you repeatedly that you had a right to a lawyer, do you?

A. (No answer.)

Q. How many times do you say during your whole stay down there he told you that you had a right to a lawyer if you wanted one?

A. "Nary'n."

Q. So you deny that he never did tell you that you had a right to an attorney?

A. No, sir.

Q. You did have an attorney down there, didn't you?

A. No, sir.

Q. You never had an attorney?

A. No, sir.

Q. No lawyer ever came to see you in the jail?

A. No, sir, but Lawyer Price.

Q. You remember him telling you on that occasion that he was going to check any statement that you made, don't you?

A. Yes, sir.

Q. You remember telling him that you spent Thursday night, or the night before this crime was committed, at Mattie Mae's house, don't you? You remember telling him that, don't you?

A. Was it first, when they first questioned me?

Q. Not the first question, but that afternoon? Do you remember telling him that you spent the night at Mattie Mae's house?

A. No, sir.

Q. What?

A. No.

Q. What time did you tell him you left the house on that occasion?

~~A. I don't remember.~~

Q. What?

A. I don't remember.

[fol. 113] Q. What time did you tell him you came uptown? I am talking about Monday afternoon?

A. I came uptown?

Q. Yes. What time on Monday afternoon, when he talked with you, what time did you tell him you left to come uptown on this Friday, the time this crime happened?

A. About 9:30 or 10:00 o'clock.

Q. Well, you remember he talked with you about an hour or an hour and a half on that occasion, didn't he?

A. Yes, sir.

Q. And then you went back to jail? That is right, isn't it?



A. Yes, sir.

Q. And then he came up there and talked with you again—I mean, brought you back down there in Capt. Burke's office and talked with you that night, didn't he?

A. Yes, sir.

Q. And he talked with you for just a few minutes on that occasion, didn't he, Monday night?

A. About a half an hour.

Q. About a half an hour?

A. Yes, sir.

Q. And you weren't talked with except then, Monday afternoon and Monday night? About what time was it that he came up there Monday night? What time did he talk with you?

A. Monday night?

Q. Yes?

A. They come and got me about dusk, about dusk, something like that.

Q. Came and got you and brought you down in Capt. Burke's office?

A. Yes, sir.

Q. On that afternoon, the first time he talked with you, you told him that you dyed your shoes, didn't you; the first time Capt. Burke talked with you, on Monday afternoon, you told him you dyed your shoes from tan to black, didn't you?

A. Yes, sir.

Q. And he asked you why you dyed your shoes, and you said you always bought your shoes tan and dyed them black, didn't you?

[fol. 114] A. Yes, sir.

Q. Then on Tuesday Mattie Mae came up there, didn't she?

A. No.

Q. When do you say Mattie Mae came up there the first time?

A. On a Wednesday.

Q. Are you sure it was on a Wednesday?

A. I think it was Wednesday there. I am not sure.

Q. She told you, in the presence of these officers, that you didn't spend Thursday night at her home, and you

said you did, didn't you, and she said again that you didn't spend Thursday night at her home, and then you admitted that you hadn't told her the truth about it, didn't you?

A. Yes, sir.

Q. What?

A. Yes, sir.

Q. And she told you that you left the house at 11:00 o'clock, and you told her that you left before nine o'clock, didn't you?

A. Yes, sir.

Q. And she told you again that that wasn't the truth, and then you admitted that that wasn't the truth, that she was right and that you had left the house at 11:00 o'clock, didn't you?

A. Yes, sir.

Q. Then Mattie Mae said she had to leave, and went home that Tuesday afternoon that happened, didn't she?

A. (No answer.)

Q. You all were talking down in Capt. Burke's office?

A. Yes.

Q. After she left, you told Capt. Burke that you did come uptown and that you did go to the Clifton Radio Shop, didn't you?

A. Yes, sir.

Q. And then is when you told them about having seen some man go in the shop as you went up the street and having seen him come out when you came down the street? Isn't that right?

A. Yes, sir.

[Foot. 115] Q. And you knew that wasn't the truth, didn't you? You knew that wasn't the truth, didn't you?

A. (No answer.)

Q. What?

A. Sir?

Q. You knew you didn't tell them the truth on that occasion, too, didn't you?

A. No.

Q. You say you didn't tell them the truth on that occasion?

A. I actually seen him.

Q. Oh! You say now you actually seen what?

A. I seen that man come out of that radio shop.

Q. When?

A. The same day it happened. The same day that there happened.

Q. What day are you talking about?

A. June 16th, I reckon.

Q. June 16th?

A. (The witness nodded his head.)

Q. Where were you when you saw him?

A. I was going in and he was coming out.

Q. Well, when you went in, what did you do?

A. Went in there to see about getting my radio fixed.

Q. Well, did you? When you went in who was in there?

A. Nobody but her.

Q. But who?

A. That girl.

Q. The girl? Well, she was all right then when you saw the man come out, wasn't she?

A. Yes.

Q. Well, what did you mean by telling them that you heard some moaning under the desk, table there, and eased the door shut? What did you tell them that for then?

A. I told them a lot of different stories.

Q. You admit that you never told them the truth at any of these preliminary meetings that they had with you? Isn't that right?

A. That is right.

Q. You were deceiving them, first one way and then another, weren't you?

A. That is right.

[fol. 116] Q. You were leading them on every wild goose chase you could lead them on, weren't you?

A. That is right.

Q. And you were never telling them the truth at any time?

A. (No answer.)

Q. And they were being as good to you as they knew how to be, weren't they?

A. (No answer.)

Q. Didn't you have a meal every time mealtime came around?

A. Yes.

Q. Did anybody ever offer to do you any harm in any way, any small way; I am talking about any police officer or anybody in the custody of that jail, offer to do you any small harm during your time down there?

A. You mean hit me, or something like that?

Q. Hit you or do anything?

A. No.

Q. What?

A. No.

Q. They were as good to you as you have ever been treated in your life, weren't they? I am talking about these officers that had you in charge down there?

A. (No answer.)

Q. Throughout your stay in that jail they were as good to you as you have ever been treated in your life, weren't they? Isn't that correct?

A. (No answer.)

Mr. Price: Now, if your Honor please, I think the questioning has gone a little astray. The purpose of these preliminary investigations, if your Honor please, is simply to determine whether or not the confession, if any confession was made, whether it was voluntary or involuntary, and that is the only purpose, and to go into the merits. I can see where, well, it is a fine opportunity for him to parade all the testimony out before the Court.

The Court: He is asking him whether or not he was mistreated in any way. That goes to the voluntariness.

[fol. 117] Mr. Price: I mean all that happened up at the radio shop, and what he told the officers. I don't think that is a proper line of questions.

The Court: Go ahead.

Q. You were treated by these officers and these people that had you in charge as good as you ever have been treated in your life, weren't you? Isn't that correct, Clyde?

A. No.

Q. Well, what do you say that they did that wasn't right, then?

A. (No answer.)



Q. What?

A. One thing that wasn't right?

Q. One thing that wasn't right? Now, you tell us what it was?

A. That is when they had me down there questioning, and Mr. Reid, here, told me, say, "We just as well go down there and put his mother in jail."

Q. Oh, you say they told—

A. That is right.

Q. But, apart from that, everything else was just perfect, you say? Who told you to say that?

A. Who told me to say that?

Q. That is what I asked you?

A. I said, what he told, what I heard.

Q. Don't you know that Mr. Reid went out there and tried to get your mother to come up there to the jail to see you?

A. That ain't what he said there in that office, though.

Q. When was that that you say anybody said anything about putting your mother in jail?

A. Before that confession took place.

Q. Before what confession took place?

A. (No answer.)

Q. Before what confession took place?

A. (No answer.)

Q. Do you want to answer that?

A. No.

Q. What?

A. No.

Q. You asked that your friend Augusta Henry be brought up there, didn't you?

[fol. 118] A. No.

Q. Well, he is your friend, isn't he?

A. I didn't ask for none of them boys to be brought up there.

Q. Didn't you tell these officers that if they'd go get Augusta Henry that you could prove that you weren't guilty?

A. No.

Q. What did you tell them about that?

A. I told who I seen on my way home that day. I didn't actually see none of them boys.

Q. You didn't see any of these boys?

A. I told you I didn't ask none of them to get up here.

Q. You didn't see any of those boys?

A. I told you I didn't ask none of them to get up here.

Q. Didn't ask any of them to come up?

A. Nope.

Q. Well, Augusta Henry came up because you asked for Augusta?

A. They brought them. I didn't go get them.

Q. Didn't you tell the officers that if you could get Augusta, he could prove where you were?

A. No.

Q. When he came up, he said he saw you and you had a dark substance on your clothes? Isn't that what happened?

A. Yes.

Q. Isn't that exactly what happened there?

A. Yes, they brought him up there.

Q. They gave you cigarettes; they did everything they could to make you comfortable down there, didn't they?

A. Yes.

Q. You told your lawyer that, didn't you?

A. (No answer.)

Q. Didn't you?

A. What is that?

Q. You told your attorney that they did everything they could possibly do to make you comfortable down there, didn't you?

A. Yes, sir.

Q. And you say one lone, isolated incident—Are you [fol. 119] sure you understood what Mr. Reid said?

A. I am positive I understood what he said.

Q. Oh, you are just positive of that?

A. I am positive.

Q. Aside from that, everybody treated you with every bit of courtesy they could, and you say that is the only thing they did wrong at all?

A. That is right.

Q. On Saturday morning Capt. Burke killed you down.

stairs and told you he was going to read—wanted to read a warrant to you, didn't he?

A. Yes.

Q. And he read the warrant to you, charging you with this crime?

A. Yes.

Q. What happened after he read this warrant to you? Did he say anything to you besides read the warrant to you?

A. No.

Q. Just read the warrant to you and told you he was charging you with this crime?

A. (The witness nodded his head.)

Q. They carried you back upstairs and put you in jail then, didn't they?

A. No.

Q. What did they do with you?

A. Mr. Reid and Mr. Carter sat down and talked to me.

Q. How long did they talk with you?

A. I don't know—about a half an hour.

Q. What did you tell them on that occasion?

A. (No answer.)

Q. What?

A. (No answer.)

Q. Did you tell them the truth on that occasion?

A. Yes.

Q. You did?

A. Yes.

Q. You told them that you did go in there to rob the girl and took her pocketbook, but you didn't rape her, didn't you?

A. Yes.

Q. And you told them the truth on that occasion?

A. Yes.

[fol. 120] Q. You told them how you beat her, didn't you?

A. Yes.

Q. And that was the truth, wasn't it?

A. Yes.

Q. They didn't in any way threaten you at that time, did they?

A. No.

Q. Didn't mistreat you in any way, did they?

A. No.

Q. They were as nice to you as you have ever been treated in your life, weren't they?

A. (No answer.)

Q. On that occasion they told you and warned you about what your rights were, didn't they?

A. Yes.

Q. They told you then that you had a right to a lawyer and that you didn't have to make any statements, and any statement could be used against you, didn't they?

A. No, sir, they did not say nothing about no lawyer.

Q. Did you mention anything about a lawyer?

A. No.

Q. You didn't even mention it at all?

A. No.

Q. Although they told you they were going to charge you with this crime?

A. Yes.

Q. But they did tell you that any statement you made would be used against you or for you, as the case may be, didn't they?

A. (The witness nodded his head.)

Q. Let's see. On Thursday you told Captain Burke that you had a lawyer, didn't you?

A. No.

Q. What was it you told him about the lawyer?

A. I ain't told him nothing about no lawyer.

Q. You didn't tell Capt. Burke that you had a lawyer, on Thursday?

A. No, sir.

Mr. Price: I'd like to know what Thursday he is referring to?

Q. I am talking about on the Thursday after you were arrested on Monday?

A. No.

[fol. 121] Q. On this Saturday morning you went into detail and explained to them how you had called the girl on the telephone and pretended to be a woman, didn't you?

A. I don't want to say about that.



Q. What?

A. I don't want to talk about that.

Mr. Price: If your Honor please, I think we are still going into the merits of the case. I don't think that is proper, at all.

The Court: He is asking about the statement he made.

Mr. Price: It is a question of whether the statement is voluntary or involuntary; not what the statement contains.

The Court: It is proof of its voluntariness; whether or not the statement is true is some evidence. If he was forced to tell an untruth, then that would have an important bearing, or if he told the truth.

Q. On this Saturday morning you told Mr. Carter and Mr. Reid that you went to the City Market and called this girl to Grossman's Record Shop for the purpose of getting her away from the place, so you could search it, didn't you?

A. Yes.

Q. And that when you called her on the phone, you pretended to be a woman and inquired about a radio, didn't you?

A. Yes.

Q. You told them that you then went to the place and found her in it, didn't you?

A. (No answer.)

Q. Didn't you tell them that? Isn't that correct? Didn't you tell them that on this Saturday morning? Answer the question! Didn't you?

A. Saturday morning?

Q. This Saturday morning when you were talking to [fol. 122] Mr. Carter and Mr. Reid; after you told them that you had called her to the telephone and pretended to be a woman, then you told them you went around to the place, didn't you?

A. Yes, sir.

Q. And you told them that when you went in, when she caught you searching her desk drawer, that she went for the rifle and that you beat her to it? Didn't you tell them that? Isn't that what you told them on Saturday morn-

ing when you were talking with them? Isn't that what you told them, Clyde?

A. (No answer.)

Q. You can answer these questions—What?

A. (No answer.)

Mr. Price: If your Honor please, I hate to interrupt counsel so much, but inasmuch as there has been no ruling on this question up to this point, if his answer to this question amounts to a confession, I don't think he has to give it, and I would object to it and ask your Honor to permit me that privilege.

The Court: Anything he says now is not competent before a jury.

Mr. Price: I understand it isn't.

The Court: This evidence which he is giving now will not go before the jury unless he goes on the stand and repeats it for the jury.

(Examination of Clyde Brown by the Court, in the absence of the Jury).

Q. Clyde, let me ask you a question. From the time you were put in custody on the 19th of June, up until after Mr. Price was employed, came over there to the jail to see you, after you made all the statements you made in this case, were you ever mistreated in any manner by these officers, any of the officers?

A. No.

{fol. 123} Q. Was any violence used or threatened to be used against you?

A. No, sir.

Q. Did anybody hit you or threaten to hit you?

A. No, sir.

Q. Did anybody threaten to do you any physical injury of any kind?

A. No, sir.

Q. Did anybody offer you any reward or hope of reward to make any statement?

A. No, sir.

Q. Did anybody tell you that you'd get out lighter,

they'd try to help you get out lighter if you'd make a statement?

A. No.

Q. And were you, at different times—at least on two occasions, I believe you said—warned that you did not have to make a statement?

A. Yes, sir.

Q. You were warned at least once before you made this final statement? Is that correct?

A. Yes, sir.

Q. At that time you were told that any statements which you might make would be used against you?

A. Yes, sir.

The Court: All right. Do you want to ask him anything else?

Mr. Price: No, sir. That is all.

(Examination of Clyde Brown by the Solicitor continued, without the jury).

Q. Now that is the statement you made on Monday?

A. (No answer).

[fol. 124] Q. On Monday morning you sent for these officers, by Sergeant Tillotson, didn't you?

A. I can't recall that.

Q. What?

A. I can't recall that.

Q. He never did call them?

A. I can't recall that, can't remember sending.

Q. You know Sergeant Tillotson, don't you?

A. Yes, sir.

Q. You told him on Monday morning that you wanted to see Mr. Reid and Mr. Carter, didn't you?

A. Yes, sir.

Q. What?

A. Yes, sir.

Q. And he told you that they weren't in the building and he couldn't get them for you, didn't he?

A. Yes, sir.

Q. And about a half hour later he called you—I mean, you called Sergeant Tillotson again and asked him again to get Mr. Reid and Mr. Carter, didn't you?

A. I don't remember it.

Q. You don't remember asking him but one time?

A. That is all.

Q. Well, some half hour after you asked, he came and got you and told you Mr. Reid and Mr. Carter were downstairs now, didn't he, about a half hour after you asked for them on Monday morning after you were arrested on the previous Monday? Isn't that correct?

A. I don't remember.

Q. What?

A. I can't remember.

Q. Well, you remember going downstairs on Monday morning and talking to Mr. Reid and Mr. Carter, don't [fol. 125] you, in Captain Burke's office?

A. No, sir.

Q. You don't remember talking to these officers?

A. No, sir.

Q. Do you remember saying, the morning that you said to Mr. Carter, "I didn't tell you all the truth and I want to tell it now?" Do you remember doing that, to Mr. Reid and Mr. Carter?

A. I just don't remember.

Q. What?

A. I just don't remember.

Q. That was on Monday, after you were arrested on the previous Monday, and after you had been charged on Saturday? Don't you remember calling for Mr. Reid and Mr. Carter?

A. No.

Q. What?

A. No.

Q. You don't deny you called for them, do you?

A. I don't remember.

Q. What?

A. I don't remember.

Q. You remember telling them where to locate the pocket-book?

A. Yes;

Q. Well, that is the day I am talking about?

A. I don't remember—

Q. You remember the conversation you had on that day?



A. No, sir.

Q. What?

A. No.

Q. Don't you remember telling Mr. Carter and Mr. Reid, "I didn't tell you all the truth, and I want to tell it to you now," on that Monday?

A. No.

Q. You don't even remember having a conversation on that day? You don't deny having it, do you?

A. No, sir.

[fol. 126] Q. What?

A. I don't deny it.

Q. You don't deny it?

A. No.

Q. Well, then, you do remember it?

A. I remember it, but I don't remember all of it.

Q. Oh! You don't remember all of it—You remember having a conversation with them; however, you just don't remember what you told them?

A. I don't remember what was said or what I said.

Q. But you do remember that they told you—

The Solicitor: I won't go into that again, your Honor.

The Court: Clyde, did you ever ask them to get you an attorney, a lawyer?

A. No, sir.

The Court: Never requested it?

A. No, sir.

The Court: Is that all, Mr. Solicitor?

The Solicitor: That is all.

The Court: Do you have any other evidence you want to offer on this question?

Mr. Price: No, sir, no other evidence. I would like to be heard briefly on it.

The Court: Do you want to offer anything further, Mr. Solicitor?

The Solicitor: Yes, sir, I want to offer these other officers.

(To the foregoing examination of Clyde Brown, by the Solicitor, in the absence of the Jury, the defendant objects and moves the Court to strike all questions and answers not pertinent to the specific issue as to whether the statement

[fol. 127] or confessions purporting to have been made by the defendant were voluntary or involuntary.

Motion overruled and defendant, in apt time, excepts—  
Exception No. 16.

CAPTAIN W. R. BURKE testified, in the absence of the jury, as follows:

Q. You are Capt. W. R. Burke?

A. Yes, sir.

Q. You are head of the Detective Division of the Winston-Salem Police Department and were on the 16th day of June?—Is that correct, Captain Burke?

A. That is correct.

Q. Captain, were you present on the afternoon of June 19th, Monday afternoon, when the defendant, Clyde Brown, was first talked with?

A. I was.

Q. I want you to tell the Court if he was in any way placed in any fear, compulsion, under any duress, or in any way offered any reward, immunity, or hope of reward or favor?

A. No, sir, he was not.

Q. I want you to tell his Honor just what you did tell him about his rights?

A. Well, sir, first I might say, in consequence of information, when I left the Station on Sunday afternoon, the 18th, I left two detectives looking for Clyde. When I arrived on duty around 8 o'clock Monday morning, I found on my desk a note telling me that Clyde was in custody. At that time we were receiving a number of calls to be answered, and it was that afternoon around 3 o'clock before I got around to talking to Clyde. At that time I asked, as well as I recall it was Mr. Wooten and Mr. Adams and some of them to go up to the jail and bring Clyde down to my office, which they did. When they brought him in, [fol. 128] I asked him, I said, "Is this Clyde Brown?" He said, "Yes." I asked him where he lived, and he told me. I says, "Well, sit down," says, "Brown, in connection with this crime that happened up here on Friday, we have been talking with a lot of people, and in our investigations we

have found that it is necessary, we think, to ask you some questions about the case. This doesn't mean in any way that you are accused of committing the crime, whatsoever. I want to tell you before you go further, that you do not have to answer any questions that you don't care to answer. You do not, as well as any other person, have to make any statement that you don't care to make. Also, you or any other person who is held for investigation in connection with any crime, is entitled to counsel. You are entitled to be permitted to talk to any of your people in arranging for counsel; but any statement you or any other person has to make has to be made purely voluntarily. You are not going to be harmed in any way."

Q: Did you tell him, at that time, that any statement he made was going to be checked?

A: I did. I says, "We want to ask you some questions, and I want to tell you we are going to check them very carefully." I then began asking him where he was at, where he spent the night on Thursday night; just sat there and talked in a casual manner. He said he spent the night down at his girl friend's, Mattie Mae Mitchell's, on Wilson Street; said he got up early Friday morning, left there; said he came uptown, brought a radio to have pawned; that Mattie Mae was planning to put on a party on Friday night, and that he had told her he would get the money for her to purchase sandwiches and other things that she was to use in putting on her party; that he got back home—he was gone an hour or so; that he stopped in at the radio shop on Seventh Street; that there was a girl in there; he asked her if they fixed radios; she told him that they didn't fix radios in the daytime but that her father [Vol. 129] fixed radios at night; if he wanted to leave the radio, she's be glad to have it fixed; he told her, no, he'd take it somewhere else; then he walked on around to Fowler's Furniture Store on Liberty Street, and that he left the radio there; said he walked down Sixth Street to the Market, and was gone for a little bit, and he decided when he got down to the Market that he'd go back to the furniture store and get the radio, that he wanted to pawn that afternoon, and that the reason he was anxious to get the work done on the radio is that he contended that

it would not play but a little while at the time and he was afraid when he taken it to pawn, it wouldn't play long enough for him to get it pawned; that he went on back and got the radio and went on back home. And then that was his story there. I asked him what kind of clothes he was wearing; says, "I was wearing the same clothes I have got on now," which was the clothes that he has there now, polo shirt and grey pants. I examined his shoes and noticed, in looking at them, I asked him, I says, "Clyde, how long have you had the shoes?" Said he bought the shoes two weeks; bought them just a day or two before, that school was out; said he bought the shirt and bought, it was either one or two pair of trousers the same day; said he carried his little sister, who was getting out of the elementary school, he carried her with him downtown and also bought some things for her. The shoes, when I examined them, I asked him why—I says, "Is this the color of the shoes when you bought them?" He says, "No, they were tan." And I asked him when he dyed them. He says he dyed them on Friday evening. I asked him why. Says, well, he didn't know; he always dyed his shoes; that he always bought tan shoes and dyed them black. And that was about the end of the conversation at that time.

Q. In all, how long was he talked with, Captain, on that occasion?

[fol. 180] A. I think, as well as I recall, that was approximately 3:30, when we brought him into the office, and it was around 5 or a little after, might have been 5:30, when he went back up, evidently right about 5 o'clock, because Chief Gold and I left the office right after that and we were down on Trade and Northwest Boulevard at 6:00.

Q. Did you talk with him again that night?

A. Yes, sir, I did.

Q. How long did you talk with him that time?

A. Talked to him, I think it was around 9, probably 9 or 9:30, when we talked to him; talked to him, I'd judge, for about an hour, I think about a quarter till—

Q. Did you in any way threaten him on that occasion?

A. No, sir, we did not.

Q. Offer him any immunity or reward?

A. We did not.



Q. Place him in any fear?

A. We did not. After leaving him, Chief Gold and I, we went down and talked with Mattie Mae Mitchell, talked with Clyde's mother, talked with his sister, and—

The Court: Mr. Solicitor, let's don't go back into what he said. Let's take up the various times and see what happened.

The Solicitor: All right, sir.

Q. Captain, how many different meetings were you present, or what times did you talk with Clyde Brown? Don't tell what he said; just tell us the times that you talked with him?

A. I talked with him on the two occasions on Monday evening. I talked with him on Tuesday; I think twice on Tuesday, just a short while at the time. On Tuesday I talked with him a right good while. I talked with him in the presence of Mattie Mae Mitchell, and I am not—I won't be positive, but I think his mother, either his mother or sister was in the office with her at that time, and [fol. 131] then I talked with him on Wednesday afternoon, and I talked with him on Thursday, and I think on Thursday I talked with him—well, I didn't exactly talk with him—that is when we brought in Peters, Campbell, Brown, and they made some statements in his presence. I asked him if there was anything he wanted to ask them; that is about all; I didn't ask him anything, didn't talk with him at length that time. On Thursday afternoon is the last time I talked with him until Saturday morning.

Q. Did he at any time suggest to you that he wanted counsel?

A. No, sir, he did not.

Q. Did he at any time suggest to you anything about having counsel?

A. On Thursday afternoon he stated this: He says—The reason that I remember, it was a lawyer, I thought he says, "If my Lord finds out," and I asked him the second time—the other officers, they understood him to say, "lawyer." I says, "What did you say, 'Lord' or 'lawyer'?" He says, "If my lawyer does what he is supposed to, I will get out." I then asked him if he had a lawyer,—I don't recall asking him who it was. He said he

did, and I asked him if his lawyer had been up to see him. He said he hadn't. I says, "Well, have you called him?" I says, "Why is it he hasn't been up to see you if you have got a lawyer?" And that is the last time I ever mentioned that. I haven't mentioned lawyer or he hasn't mentioned lawyer.

Q. Was he ever mistreated during the time you talked with him or during the time he was down there?

A. No, sir. I was never on the jail floor when he was up there, but he was talked to every time on the second floor, in a public office.

The Solicitor: Examine him.

[fol. 132] Examination of Captain Burke by Mr. Price—(Jury still out):

Q. Captain Burke, the first time you questioned him from 3:30 to about 5:30?

A. I'd judge it was approximately 3:30 when the officers went upstairs to bring him down to the office, and it was approximately 5 or a little after—might have been 5:30—when we put him back.

Q. And then you questioned him again that same day?

A. Later on that night, approximately 9—

Q. That was on the 19th?

A. That was.

Q. How long did you question him that evening, that night?

A. The second time?

Q. Yes, sir?

A. I'd say about an hour or hour and a half.

Q. About an hour?

A. Probably an hour and a half.

Q. Now, on each of these occasions that you talked to Clyde Brown, Captain Burke, you talked to him from an hour to an hour and a half or two hours—isn't that right?

A. Not every time. The first two occasions, on Monday afternoon and then a second time, later on on Monday afternoon, and then on Tuesday afternoon, I'd judge I talked with him a couple of hours, and then from then on, all the times I saw him was probably anywhere from 10 to 15 to 20 minutes, and on Thursday evening I talked with

him approximately an hour, and then I didn't see him until Saturday morning.

Q. Those are the occasions you are referring to, they were regular Police questioning? I mean, you were not just talking to him, no social conversation, you were questioning him about this crime?

[fol. 133] A. We were questioning him in connection with this crime.

Q. Despite the fact you warned him of his rights and told him he could have the benefit of counsel and all that, you did question him for from one to two hours on each occasion?

A. I'd judge we talked to him—I talked to him on two occasions at least for two hours. Now during that time I was interrupted once or twice, telephone ringing and people coming in and out of the office, but I'd say he was in the office as long as two hours.

Mr. Price: That is all,

The Court: Is there any other evidence for the defendant on this question?

Mr. Price: No, sir.

The Court: It appearing to the Court from the foregoing testimony that the defendant was not denied the right to employ counsel; that he was warned that any statement which he might make could be used against him, and that he was not required to make any statement; and if further appearing to the Court that the defendant was not in any manner physically mistreated, threatened or otherwise coerced; and it further appearing to the Court that the defendant was not offered any reward, hope of reward, promised any immunity or hope of immunity for making said statements;

The Court, therefore, finds as a fact that said statements were freely and voluntarily given and are competent.

To the Court's ruling the defendant, in apt time, excepts—Exception No. 17.

(At this point in the trial the jury returned to the Courtroom).

[fol. 134] (Trial continued in the presence of the jury):

P. G. DUNCAN testified: (Mr. Duncan's testimony was offered out of order, with the Court's permission).

I live at 1305 South Thomas Street, in Arlington, Va. I am a special agent of the Federal Bureau of Investigation, and I am assigned to the F. B. I. Laboratory in Washington, D. C. In the laboratory my duties consist of the analysis of blood and other body fluids, the examination and comparison of hairs and fibres. I lecture on blood examinations before training schools, and I also write and collaborate on writing articles on blood examinations and criminal investigations. I have been with the F. B. I. Laboratory since March 1942. I have never kept any specific figure on the number of blood examinations I have made, but I have made thousands of such examinations on evidence submitted to the F. B. I. from law enforcement agencies all over the country. I have a Bachelor of Science degree in Chemistry from the University of Illinois, and on entering the F. B. I. Laboratory I was given special training in the fields that I mentioned. (Defense counsel admitted Mr. Duncan to be an expert in blood analysis, and the Court so found).

(The witness was handed a cellophane package containing a garment): This package and its contents, that is, the garment itself, was received by me and the F. B. I. I was requested to make an examination of the trousers to ascertain whether or not there was any blood present on the trousers, and I made such an examination.

In examining this pair of trousers, I found that on the front of the trousers and on both legs there were a number of spots and also smears of red material. I made a microscopic examination of those red smears and spots and I [fol. 135] made chemical examination of them and I also made a serological examination of them, and I found, as the result of those tests, that those red spots and smears on the legs of this garment consist of human blood; it was not present in a quantity sufficient to type it; in other words, they were small spots and smears, and I found that the



amount of material, while definitely sufficient to ascertain that it consisted of human blood, was not present in sufficient quantity to make grouping or typing tests to ascertain the blood group of the person from whom the blood came. (The trousers were marked for identification as "State's Exhibit No. 1").

### Cross-examination.

I received the trousers on the 3rd of July of this year and made my tests on the 5th of July of this year. I reported my findings to the Police Department of Winston-Salem. There was a report directly to Chief of Police Gold here in Winston-Salem.

W. F. Reid, having been previously sworn, was recalled by the State, and testified: My name is W. F. Reid.

Q. Mr. Reid, I had asked you what statements the defendant, Clyde Brown, made to you on Monday afternoon. Please state to the jury what statement it was he made to you on that Monday afternoon when you talked with him at approximately 3:30 in the afternoon?

Objection—overruled—and defendant, in apt time, excepts—Exception No. 18.

A. I was sitting in the office, Captain Burke's office with Captain Burke, Clyde Brown, and I believe, Mr. Adams, and Captain Burke asked Clyde about where he spent the night on Thursday night. Clyde stated that he spent the night with his girl friend, Mattie Mae Mitchell, on Wilson [fol. 136] Street, where they lived; that he got up the next morning, came down town about 9 o'clock, and brought with him his small portable radio; that he went to the Clifton Radio Shop on Seventh Street, went in and talked with a girl that was there, asked to get his radio fixed and was informed by her that they didn't fix radios in the daytime, that her father fixed them at night; that he did not leave the radio and went on around to Fowler's Furniture Store on Liberty Street; that he went in there and talked with them regarding the radio and getting it fixed; that he

innocent." Captain Burke said to Clyde, "What do you mean, Clyde, by proving yourself innocent? Do you mean that you know who committed this crime or know something about it?" Clyde stated at that time that Mattie Mae was telling the truth about the time he left home; that he left home shortly after 11 o'clock; that he did come up-town with his radio and that he went to Clifton's Radio Shop shortly after 11 o'clock with this radio, the little girl was there, and he asked about getting the radio worked on and was informed by her that they didn't work on radios in the daytime, that her father worked on radios at night; and he stated that the little girl there asked if he wanted to leave the radio; that he told her, no, that he wouldn't leave it, and he came out, and as he came out the door he met a colored man going in; so he went on around to Fowler's Furniture Store; that he went in Fowler's Furniture Store, talked with the men in there regarding getting his radio fixed; that they called someone there in Fowler's about repairing his radio, and that he left it there at that [fol. 138] time; that he went down to the City Market and was gone a short while, and that he decided to go back by Fowler's and get his radio, which he did, and that he got his radio and started back home, and as he got near this Clifton's Radio Shop he heard a woman scream in the radio shop, and as he got in front of it, a radio fell, and that he looked in but he didn't see nobody as he walked on by; that he walked on West on Seventh Street to Trade Street; that he stopped and studied a moment and thought to himself, "There must be something wrong there;" so he turned around and went back or started back to the radio shop; that he got about half way back to the radio shop and this same colored man came out of the door and started walking, meeting him on Seventh Street, and that he walked a short ways and when he looked up and saw him he immediately turned around and went East on Seventh Street, in the opposite direction; that he walked to Liberty Street and then turned north and disappeared out of his sight. Clyde stated that he then noticed the door to the radio shop being cracked a little, partly open; he stated that he pushed the door open far enough to step inside; that when he stepped inside he heard someone groaning behind the

did leave his radio there at Fowler's; that he walked off down about the City Market, was gone a short time and went back to Fowler's and got the radio and went back home.

I was present when Clyde Brown was talked to again that night along about 9:15. On that occasion Captain Burke informed Clyde that his story had been checked, his statement had been checked, and that his statement did not correspond with other people whom he had mentioned, and that his statement regarding his clothing that he was wearing at the time and the time that he left home definitely did not correspond with other folks that he had mentioned. Clyde contended that that was about true, as far as he could arrive at it at that time, that night. On Monday night I think Clyde was kept there in the office probably an hour, maybe an hour and a half, to the best of my knowledge.

On Tuesday, Mattie Mae Mitchell, Captain Burke and myself, and I don't recall who all else, was in the office, in Captain Burke's office. Clyde Brown was there. I don't recall whether Mattie Mae's sister or her mother—I don't recall whether either one of them was there or not, but I know Mattie Mae Mitchell was there. Mattie Mae Mitchell told Clyde, in the presence of us there in Captain Burke's office, that he did not leave her home at around 9 o'clock, as [fol. 137] he stated; that he knew it was 11 or after when he left. She also stated that he did not leave her home wearing a sport shirt and trousers; that he left her home wearing an old black wool shirt and ragged overalls; and that he returned wearing the same clothes about 12:30 or a quarter to 1. She stated that he did not spend the night there on Thursday night, as he had stated, and that he knew that he didn't.

Immediately after Mattie Mae left the office, Clyde stated that Mattie Mae was telling the truth about the time he left there and what he was wearing; he stated that Mattie Mae was telling the truth about him spending Thursday night at her house, that he did not spend the night there, he walked around the streets all night and never did go to bed. After Mattie Mae left the office Clyde said, "May I ask a question?" Captain Burke told him he could. Clyde said, "If you will give me until tomorrow night, I'll prove myself

counter, back behind the counter in the radio shop; that he immediately then stepped back outside and pulled the door back, kind of like he found it, and left; that he walked west on 7th Street and on across Trade Street, and as he crossed Trade and was walking on down 7th Street towards Oak Street he saw Isiah, a boy he knows as Isiah, and that he spoke to him; that Isiah spoke to him; that Isiah said to him, "Boy, I'll give you \$18.00 for that radio;" he said he said back to Isiah, "Make it \$10.00;" that he walked on north on Oak Street and Isiah followed him—they walked on, and Isiah followed him about twenty or twenty-five feet behind him; that he got to 8th Street and that Clyde Brown, Clyde stated, then turned to the left on 8th Street and went in the direction of Cherry Street, and that Isiah went on North on Oak Street, and that he went on to Cherry Street [fol. 139] and down Cherry Street and up on a railroad siding there which he calls the White Sand, which is about 100 to 150 feet off of Cherry Street. The colored people in that section all call that railroad siding the White Sand, because there is white sand spread all in there. Clyde stated that he then walked on up on the White Sand where he saw Augusta Henry; that he spoke to Augusta Henry and Augusta Henry asked him to run his dog back, a little dog that was following him, and that he did run the little dog back, and that he went on home. He told us that on Tuesday after Mattie Mae had been down there to the jail.

Augusta Henry was brought to the Station and questioned, and asked, in Clyde's presence, if he did see Clyde, when he had seen Clyde, or if he had seen him. He stated that he did see him down on the White Sand on this day and that he looked like he had something on his clothes that looked like tar or grease, and that he asked Clyde what it was that he had on his clothing; that Clyde told him that he had been working, laying tar or in tar and made himself a dollar and quit, and at that time Augusta Henry told Clyde, in his presence, he asked him to run his dog back at that time.

I was present when Roosevelt Peters and Tom Campbell were there. Roosevelt Peters and Tom Campbell stated, in Clyde Brown's presence, that they did see him down on the White Sand around 12:23 or 12:30 on June 16th.



I think the next time I talked with Clyde was after Capt. Burke read the warrants to Clyde on Saturday. On Saturday morning Clyde was charged with assault with intent to kill and rape on Betty Jane Clifton, and the warrant was read to him in our record room on the second floor of the City Hall. After Capt. Burke read the warrants to Clyde, Capt. Burke left the office and, so far as I know, left the building.

[fol. 100] At that time Clyde made a statement to Mr. Carter and myself and stated that he hadn't told the truth; that he wanted to tell it like it happened. He stated on June 16th, about 11 o'clock, he left home, as Mattie Mae said; that he didn't think Mattie Mae knew that he carried the radio; that he left there and at the time he left there he was wearing a black, long-sleeved shirt and an old pair of ragged overalls; that when he left Mattie Mae's home he went to his mother's home at 408 West Twelve-and-a-Half Street. It is probably 150 feet across the railroad from the White Sand to his mother's home. Mattie Mae's home is approximately six or seven blocks from his mother's home, on beyond, going from the City. Taking a nearer cut across there it probably wouldn't be no farther than five blocks, walking. Mattie Mae's home is on Wilson Street, in the first block North of Northwest Boulevard. The White Sand is South of Northwest Boulevard. Clyde stated that he left home that morning around 11:00, left Mattie Mae's house around 11 or shortly after; at that time he didn't know whether Mattie Mae knew whether he had the radio or not, but he did have it. He stated that he had on, at that time, a black wool shirt, long-sleeved, and a pair of ragged waist overalls; that he left home and he went to his mother's home on Twelve-and-a-Half Street and that he changed clothes there; that he took off this old black shirt and that he put on a sport shirt, green sport shirt, and a pair of grey checkered trousers, and that he went from there up to Clifton's Radio Shop, and that he went in and talked with the little girl reparding a radio, getting it fixed; that he was informed by her that they didn't work on radios in the daytime but her father did that work at night. He stated that he didn't leave the radio; that he left there and went around to Fowler's Furniture Store; that he went in and talked

with them regarding getting the radio fixed; that he left the radio there and that he walked down to the City Market and was gone a short time and decided to go back and get [fol. 141] the radio, which he did; that he got the radio and that he went back by the Clifton Radio Shop; that he went in, and that while the little radio that he had was playing, he was in the act of taking a billfolder out of the desk drawer, and that the little girl that was in there alone at that time caught him taking this billfolder and putting it in his pocket; that she screamed and started toward the rifle; that he beat her to the rifle, and that he grabbed her by the throat with one hand and that he reached and got the rifle with the other hand. He stated that he hit her with the rifle two or three times, and that she fell to the floor, and that he then started to leave, got to the door, that he heard her groan and decided that that wouldn't do, that she might recognize him; that he went back and got the rifle and hit her two or three more licks with the rifle, and that he left and went out of the radio shop and West on Seventh Street; that he crossed Trade and headed on towards Oak Street; that he did see Isiah, as he stated; that they spoke; that Isiah followed him on North on Eighth Street; that he took particular notice that Isiah didn't get too close to him for the reason that he had blood on his clothes and he didn't want Isiah seeing the blood, so he walked on North on Oak Street to Eighth Street and Isiah never did get any closer to him, and that he thought Isiah must be around 20 to 25 feet behind him during that time; that he turned to the left on Eighth Street and that Isiah went straight on out Oak Street; that he walked down to Cherry Street and then followed Cherry Street a short distance to where you turn up to the railroad siding which he calls the White Sand, and up on the White Sand he met Augusta Henry, and that Augusta Henry asked him what it was all over his clothes. Clyde stated that when Augusta Henry asked him about his clothing he told him he had been working in some tar, that he had made himself a dollar and quit; that at that time Augusta Henry asked Clyde to run his dog back, which he did, and that he went on up [fol. 142] to his mother's; where he took those clothes off and put on the same clothes that he was wearing when he

left Mattie Mae Mitchell's home that morning, and that then he went back to Mattie Mae's home dressed just like he was when he left there.

As I recall, Clyde told about making a telephone call, the last time I talked with him; he might have stated that in that conversation on Saturday, but I don't recall that clearly in my mind; but I do know he made the telephone call in the next one, on Monday. I don't recall whether he told me about the telephone call on Saturday now or not; I am not positive about that.

On Sunday morning, Mattie Mae Mitchell, Clyde's girl friend, wanted to go up and talk with Clyde in jail. Mattie Mae Mitchell is the girl he had lived with part of the time. Mr. Carter and I went up in jail with Mattie Mae Mitchell, and we went into the little kitchen up there where the meals are prepared, and Clyde was brought in there, and they talked, and during her conversation, Mattie Mae Mitchell asked Clyde what he did with the clothes that he was wearing on this occasion. Clyde asked Mr. Carter and me if Mattie Mae Mitchell would be allowed to get these clothes if he told her where they were. We informed him that she would. Then, at that time, Clyde said to Mattie Mae, in a low tone of voice, "In the old liquor stash." Mattie Mae shook her head, yes, that she knew where that was. I believe Clyde added, his mother's house, and Mattie Mae indicated that she knew where that was. Then Clyde was placed back in jail and Mr. Carter and I went with Mattie Mae Mitchell to the home of the mother of Clyde Brown, which is 408 West Twelve-and-a-Half Street. While searching around in the yard there around the home, the next thing we noticed, in a few moments, Mattie Mae was walking down between the houses with the pair of pants rolled up under her arm.

[fol. 143] (Witness indicated pants marked "State's Exhibit No. 1" for identification). We stopped Mattie Mae and took those pants from her and talked with her about the spot that she got them from, the particular place where she got them from, and she carried us and showed us an old trap in the floor of a toilet next door to his mother's, a toilet that is on the back porch, and there is a loose plank in the floor of that toilet. Mattie Mae carried us to this

trap and told us that that was where she got those pants. She had them wrapped at that time in a newspaper that was damp and dirty, and at that time there were other newspapers in that trap that were damp and dirty.

After recovering the pants I showed them to Clyde Brown, and he stated that they were his pants and the ones he was wearing at the time that he said he had gone in the shop.

Q. Now, Mr. Reid, I want you to tell the jury what happened on Monday morning, the following Monday morning after Clyde was arrested on Monday, the 19th?

Objection—overruled—and defendant, in apt time, excepts—Exception No. 19.

On the Monday morning following the Monday Clyde was arrested, Mr. Carter and I were working in a radio car and received a call to come to the Station. When we went in, Capt. Burke and Chief Gold informed us that Clyde Brown had been asking for us and had asked for us the second time. At that time we went up in jail and got Clyde Brown and carried him down to the Detective Office on the second floor of the City Hall, Room 213. At that time Clyde stated to us that he had not told all the truth yet, and that he wanted to get it off his chest, that it was worrying him, and that he wanted to make a true statement as to exactly what happened in this case.

[fol. 144] During that conversation, Mr. Carter warned Clyde of his rights, and Clyde went ahead and made this statement: He stated that he left home, on Wilson Street, shortly after 11:00 o'clock on June 16th, on that morning; that when he left there he was wearing an old black shirt with long sleeves and ragged waist overalls; that he left there carrying this little radio of his; that he went to his mother's home on West Twelve-and-a-Half Street and changed his clothes, putting on a short-sleeved sport shirt, green knit shirt, and that he put on a pair of grey checkered trousers; that the reason he did this was so he could change back in the same clothes he was wearing before he returned home, to be dressed like he was when he left home. He stated after he did that he left; that he walked uptown to Clifton's Radio Shop; that he went in and talked to the



girl in the shop about repairing his radio; that she informed him they did not work on radios in the daytime, that her father worked on radios at night, that she would have the radio worked on that night if he cared to leave it. He stated that at that time the girl was friendly and nice as she could be, however, he told her that he would not leave the radio, that he would take it somewhere else, and that he left, went around to Fowler's Furniture Store on Liberty Street; that he went in there and talked with the men in Fowler's about getting his radio fixed, and that while he was in there they called someone else to see if they could work on his radio; that he left the radio there and walked back North on Liberty Street to Seventh Street and back down to Grossman's place, which is almost directly across the street from Clifton's Radio Shop. He stated he went in Grossman's Record Shop and asked to use the telephone; that while he was using or attempting to use the telephone he got the number off the telephone; that he hung the phone up and left there and went down to the City Market; that while at the City Market he called Grossman's Record Shop, across the street from Clifton's Radio Shop, and asked him to call the girl to the telephone [fol. 145] from Clifton's Radio Shop; that a few moments later the girl answered the phone; that he tried to talk like a woman and tried to detain the girl at the phone long enough for him to go up and search the place for money; however, the girl told him she could not stay away from the radio shop, as she did not lock the door, and that she hung up and he hung up. At that time he stated he went back to Fowler's Furniture Store on Liberty Street and told them he had decided not to leave his radio there, that he was going to get it fixed somewhere else; that he took his radio and went back up Liberty Street and down to Clifton's Radio Shop on Seventh Street the second time; that he went in and the little girl was there, alone; that he had his radio on and was playing it and he sat it on the counter; that while the little girl was looking and listening to the radio he was taking a billfolder from the left hand top desk drawer in the radio shop; that while in the act of putting this billfolder in his pocket, the little girl saw him and started towards the rifle that was standing against the wall

in the place; that he grabbed her by the throat with his left hand and pushed her down on the floor behind the counter in the radio shop; that he held onto her throat with his left hand; that he taken his right hand and pulled her pants down and that he had taken his private out, holding onto her throat with his left hand; that he had taken his private out, which was real hard, and put it against her private, and that he pushed on it several different times, but that he never did get it in but just a little bit. He said he tried several times and that each time he would try that it would slip out and slip downward. He said he kept on doing this until he satisfied himself down between her legs and towards—on the floor. He said that he got up, at that time, and at the time he got up that she had stopped struggling and wasn't making any noise; however, he said at that time her eyes were open but she was laying perfectly quiet, not [fol. 14b] making any noise. He stated that he started out and when he got to the door of the radio shop the little girl jumped up and started screaming. At that time he stated that he knew she would recognize him. He stated at that time that he'd have to fix her so she couldn't recognize him; that he went back, picked up this rifle, and that he hit the little girl two or three times in the face and on the jaw with the rifle; that the little girl fell to the floor and that after she fell to the floor he hit her two or three more times on the head and face with the rifle, and at that time he pulled a mattress off of a steel cot that was laying flat on the floor under the counter, with its legs folded under. He stated he pulled this mattress off of the cot springs, placed the little girl on those springs, laid the mattress on top of her and he then left there, went out the door and west on Seventh Street, as he stated in the other statements; that he crossed Trade Street, went on to Oak Street, saw a boy he knew as Isiah; that Isiah asked him what he'd take for the radio, or offered him \$18.00 for it, and Clyde stated he said, "Make it Ten;" that he walked on north on Oak Street, carrying this radio, and that Isiah followed around 20 or 25 feet behind him; that when he got to Eighth Street he turned to his left and that Isiah went straight on on Oak Street; that he went on to Cherry Street and up on the White Sand, where he met Augusta Henry; that Augusta Henry asked

him what it was he had on his clothes; that he told him he had been working in some bar and made a dollar and quit; that Augusta Henry asked him to run his dog back, which he did. He stated that he went on then to his mother's; that he pulled off his clothes and stashed or buried these pants, and that he put back on the same clothes he had on when he left home, and that he hid the billfolder he had taken from the radio shop in the back yard of his mother's home, near a fence, in the high grass and weeds, and that this bucket he put this billfolder in was about two-thirds full [fol. 147] of dirty water. He stated he put this billfolder in this bucket of dirty water and placed a rock on top of billfolder after taking \$1.62 from the billfolder, and that he then went on home and laid down across the bed at Mattie Mae's home back on Wilson Street about, as near as he could get at it, maybe 12:30 or quarter of 1, something like that. Clyde stated that when he left the radio shop and was crossing Seventh Street, about the time he was passing the filling station near the corner of Oak and Seventh there, he looked back over his shoulder and saw a pop truck drive up in front of the place and saw Mr. Clifton get out and go inside and come immediately back out. Clyde told me what kind of a truck it was, but I don't recall at this time.

After Clyde told us about the pocketbook Mr. Carter and I then went to his mother's home, 408 West Twelve-and-a-Half Street, walked around behind the house, walked out in the back yard and walked straight to a fence that divided the lots, and in the high grass and weeds I saw a bucket sitting there, over half full of dirty water. When the bucket was turned upside down, a rock and a billfolder came out of the bucket.

The billfolder you hand me is the billfolder I found; and its contents are the same now as when I found it. This key, which Mr. Clifton stated was the key to his radio shop, was in the billfold. There was no money in it at all. Those pictures, the public library card and the lipstick pencil were in the billfold at the time I found it.

## Cross-examination.

I testified to five or six different statements purporting to come from the defendant, including the confessions. I could not be in error about anything he told me. I have quoted what the defendant said to me, as near as I possibly can, word for word. I have not added one word to two or three of those statements.

[fol. 148] Q. Haven't you added a little something to two or three of those statements, Mr. Reid?

A. Not one word).

I have not left off anything that I know of. If I left off anything it was something that I didn't think of, I forgot, it slipped my mind; but I didn't add anything. He did tell me what kind of a truck it was, but I don't recall now; that is one thing I don't remember. There may be some other things I didn't remember.

Q. You say you don't think you have remembered some things he didn't tell you?

A. I say it is possible he said some other things I don't remember.

Q. You don't think you have testified to some things he did not tell you?

A. Absolutely not.

The first time I talked with Clyde Brown was approximately 4 o'clock P. M. June 19th. The next time I talked to him was again on the 19th, around 9:15 o'clock P. M., maybe 9:30. The next time I talked to him was on the 20th, in the afternoon, probably around 3 o'clock. On each of those occasions he told me merely that he went to the radio shop to leave a radio and that the young lady informed him that she did not repair radios in the daytime but that they were repaired at night, and that he left and carried the radio some place else, or something to that effect.

I did not talk with Clyde on the 21st; I did not talk with him each day. I was present when he was questioned by Capt. Burke twice on the 19th, and I was present when Capt. Burke talked with him once on the 20th. I was present when Capt. Burke talked with him on the 22nd, once. I did not join in the questioning but was only present when Captain Burke questioned Clyde twice on the 19th and once



on the 20th; and then on the 24th, and we talked with him Sunday, the 25th, and Mr. Carter and I talked with him [fol. 149] again the 26th. That was really six times.

Q. And you say it is possible now for you to sit here, without reference to any statement, any written statement or anything, and relate accurately to this Court, his Honor and the jury what he said to you on each of those six different occasions?

A. Yes, unless—I didn't add anything; unless I have left off something.

Q. Why would you add that, Mr. Reid?

A. Well, it is possible that he could have said some things that I don't recall, that I didn't recall, but I do know that I have not added to any of his statements that he has made. I know that.

Q. Isn't it just as much likely that you could get the statement that you say that he related on the 19th mixed with the one, or confused or tangled up with the one he related on the 20th, 21st, or 22nd?

A. Well, that would be possible, if you didn't have anything else to do with the case other than just talk with him; but, following all these statements up, it impresses you well enough that you don't forget, after going out, you know, and checking on these different stories and following things like that up, and studying over it over the period of time it takes to do that, then it impresses you well enough to where you don't forget it.

I stated that on one occasion I went to the office and Mattie Mitchell was in the office there with Clyde Brown. I probably did go out and get her and bring her to Police Headquarters; I don't say now I did, I say I probably did. If I did bring her to the City Hall, then she was in Capt. Burke's office at the time that I walked in there and heard [fol. 150] the conversation, when Clyde Brown was brought in there. That is a minor detail, but it is a part of all this transaction I am talking about that I can "remember so well." I don't know that I did go out and get her and bring her to Police Headquarters then. I think I did go get Mattie Mae a time or two to talk with Clyde, but whether or not that was one of those occasions or not, I don't know. I went and got Mattie Mae a time or two.

I am not in error in stating that Clyde Brown told me he went back and struck that girl two or three times; I am going to stick to that.

Q. Have you made a record of any statement made by the defendant?

A. No, I did not make a record of it.

Q. You didn't?

A. Not of all of it.

Q. Sir?

A. Not all of them. I made notes on some of them, but not the complete statement that he'd make; I didn't make records, myself, on them.

Q. You understand what I meant, Mr. Reid? I mean, did you make a recording of any kind of his statements?

A. A recording?

Q. Yes?

A. You mean, of Brown, himself?

Q. Yes, sir?

A. Yes, we did.

Mr. Price: I just wanted to ask you if you made it. I think that is all, your Honor.

HENRY C. CAMER testified: I am a police officer for the City of Winston-Salem and am assigned to the Detective Division of the Police Department. I assisted and worked with Mr. Reid in the investigation of this matter.

[fol. 151] The case was assigned to Mr. Reid, and I assisted him with it. Capt. Burke also worked with us in this case.

There are approximately 54 feet from the front of the Clifton Radio Shop to the corner of Seventh and Trade Streets, and approximately 158 feet from the Clifton Radio Shop to the intersection of Oak and Seventh Streets. There is only one block from the intersection of Seventh and Oak Streets to Eighth and Oak Streets, a distance of approximately 300 feet. There is a distance of approximately 400 yards from the Clifton Radio Shop to the place referred to as the White Sand. There are two routes from Eighth and Oak to the White Sand, one route going on out Oak Street,

and the other down Eighth Street to Cherry Street, and down Cherry Street to where you go up into the Southern siding there. I would say it would be a little nearer to go directly down Oak Street, across the railroad.

The defendant's mother was Mattie Mae Kennedy. I know where she lived on this occasion. From her home to the White Sand was approximately 300 feet, maybe 350. The White Sand is a railroad siding with a large open space that sometime in the past someone has placed a lot of white sand or rock dust on, and the ground itself is white looking.

Mattie Mae Mitchell, who has been referred to as the defendant's girl friend, lives at 1318 Wilson Street, about 200 yards, maybe 250 yards from the White Sand, on beyond the White Sand going away from the area of the Clifton Radio Shop.

From Grossman's Record Shop to Clifton's Radio Shop the distance is approximately 32 feet, the street being 24.5 in width; they are directly across the street from one another.

The Fowler Furniture Company is on Liberty Street in the 600 block. The distance from the radio shop to the [fol. 152] corner of Seventh and Liberty is 151 feet, and the furniture store is approximately 200 feet South of the corner, or a distance of approximately 350 feet from the radio shop to the furniture store.

This object is an Emerson portable radio. Clyde stated that he had pawned the radio at the Winston Jewelry and Loan office, and the radio was taken from there.

I was present with Mr. Reid during some of the conversations he had with the defendant. On the afternoon of June 24th, which was on Saturday, Capt. Burke, Mr. Reid, and myself, and Clyde Brown were in the office of the Record Division and the Detective Division on the second floor of the City Hall. At that time Captain Burke read two warrants to Clyde, one of them charging him with rape, the other charging him with assault with a deadly weapon with intent to kill. At that time Captain Burke left the office, and Mr. Reid and I talked with Clyde. I told Clyde that he was charged with these two charges; that he did not have to make any statement at all; that any statement that he did make would be used for him or against him in

Court. I told him that he was entitled to counsel, and asked him if he had any statements to make. He made the statement which Mr. Reid testified to yesterday. He stated that he did go to the radio shop, Clifton's Radio Shop; that he took a small portable radio he was to have worked on; at that time he stated that the radio would only play for a few minutes, and that he was supposed to pawn it to get some money for his girl friend to give a party; that he wanted to be sure that the radio played long enough for the pawn shop to accept it; that first he went by the radio shop and the girl there told him there was no one to work on the radio, they only worked at night; that he told her that he would take it somewhere else, and he carried it up to the Fowler Furniture Store on Liberty Street and left it there for a while; that he went down to the Grossman's Record [fol. 153] Shop, went in and asked to use the telephone, so that he could get the telephone number from the phone; that he went down to the City Market and called that number, which was Grossman's telephone number, and asked to speak to the lady in the radio shop across the street, that in a few minutes she came to the phone and answered and he attempted to disguise his voice to sound like a woman; that he tried to get her to stay at the telephone so that he could run up to the radio shop and go in it and search for money, and that what he was intending to do was to steal money from the desk; that he knew where it was usually kept. He said that she would not stay at the phone, she told him that she would have to go back to the shop; that he then came up by the radio shop, walked up to the Fowler Furniture Store and got his radio, went back down to the radio shop; that he went in and was playing it. He said the girl liked the radio; that while she was playing the radio, he slipped his hand into the desk drawer, and as he was bringing out the money, the billfold, she caught him or saw him and she hollered and started toward a rifle which was sitting in a corner. He stated at that time that he beat her to that rifle and he caught her, hit her over the head with the rifle, knocked her down, and he said that he started out and she was groaning; that he walked back, took the rifle again, while she was lying on the floor he hit her two or three times; that he rolled her upon this cot,



pulled the mattress over her and went out, went on off, taking the radio with him; that he went on down to his mother's home; that there he changed clothes and went back to his girl friend's home on Wilson Street. At that time he stated that he had left home wearing a black shirt and a pair of overall pants and that before going uptown he had changed clothes at his mother's home, but he didn't think that anybody there, his mother or anyone else, know that he had changed his clothes; that when he went back there he took the clothes off and put back on the same ones [fol. 154] he had on when he left his girl friend's house. He said that he saw Isiah at the corner of Seventh and Trade Streets; that Isiah asked him if he wanted to sell the radio, and said, "I'll give you Eighteen for it," and Clyde said he told him, "No, make it Ten," said he repeated that twice, and said he walked about 20 or 25 feet in front of him, walking fast, said he didn't want Isiah to catch up with him. He said he was nervous, sweating, and he figured that if Isiah caught up with him he would think something was wrong with him. He said then he went down on the White Sand and saw two other boys—I don't recall their names at this time—I believe one of them was Augusta Henry, and one of them ask him to run his dog back home, and he said that he did that. And about that place in the conversation he stated that he would like to go back to his jail cell, that he wanted to think about it some more; and he was taken back to his jail cell at that time.

On Sunday morning, Mr. Reid and I went down to Mattie Mae's house. We got her, she went with us up to the Station. She wanted to see Clyde and Clyde had told us that he wanted to see her. We took her upstairs on the third floor and went into the office there, which is used for a kitchen. There Clyde and Mattie Mae talked some with Mr. Reid and I there in the room. At that time Mattie Mae told Clyde that we were looking for his pants that he was wearing on the day of this offense. She asked him if he would tell her where the pants were. He said that he would, if she would be allowed to go get them herself. He told her, in the low tone of voice as Mr. Reid stated, that the pants were buried in the old trap, and she asked if it was the one that was used by his mother sometime previous.

He stated that that was right, that was the one, and after a few more - were spoken between the two, we left. We went down to his mother's house and we were looking for the trap and when Mattie Mae got the pants and was seen [fol. 155] coming through between the two houses with the pants under her arm they were wrapped up in a sack. They were given to one of the officers—I don't recall which one it was that actually took the pants from her—and we asked her where the pants had been taken from, told her that he would like to see. She took us to a house next door to his mother's, and on the back porch there was an enclosed toilet. We received the key from the owner of the house, living there, opened the door, and there, in the floor, there was a loose board, and she stated that was where the pants came from. We opened this small trap and there we found an old newspaper, which was almost wet, it was damp.

We then took the pants to Police Headquarters, took them to Clyde Brown and asked him if that was the pair of pants that he was wearing at the time he committed the offense and the same pair of pants that he had buried. He stated that they were the ones. The pants have some black substance on them. We asked him where that came from and what it was. He stated that it came off of the floor of the radio shop where he was down on his knees. That about concluded that interview.

On Monday morning, at approximately 10:00 o'clock, in consequence of a call, Mr. Reid and I went to the Station, where we were advised that Clyde Brown had been asking to see us. In consequence of that he was brought down to the second floor in Room 213. The first statement that Clyde said at that time was: "I haven't told all of the truth and I want to tell it all now." At that time Clyde was told this: "Clyde, you have been told by Captain Burke, Chief Gold, and several other officers on each occasion that you have been talked with, that you did not have to make any statement; that any statement that you make could be used for or against you in Court, and that you was entitled to counsel." He stated that he had not told the truth and wanted to tell it; that he had been thinking about [fol. 156] it over the week-end. At that time he related the story that Mr. Reid testified to yesterday. He said that

after he had first gone to the radio shop, then he took the radio up to Fowler's; that he went back to Fowler's and got it, went down to the radio shop and was there, playing the radio; that the young girl was friendly and nice toward him, and that she caught him taking something out of the desk drawer, which was the pocketbook that he said he had taken; that she hollered; that he was right near the back of the counter; that he went around behind the counter; that he caught her by her throat, choking her, and pushed her down on the floor; that he held her down there with his left hand on her throat; that he pulled her pants down with his right hand, took his private and tried to place it in her private; that he did that several times, and he only got it in a little bit, he said. He said that it kept slipping out and down, that it was leaking, and that he, in his words "messed off on the floor;" that when he got up she was lying on her back with her eyes open but she was not moving and was not saying anything; that he thought that she was out; that he started to the door to go out and about the time he reached the door she jumped up and was jumping up and down, hollering, screaming; that he went back and caught her again, took the rifle and hit her on the head, he said several times, knocking her down on the floor, and then placing her on the cot, which was underneath the counter, placing the mattress on top of her, and that he left. About that time Clyde was asked why he beat her like he did. He stated that the reason he did that was to keep her from recognizing him; he made this motion to his head (witness made circling motion with his finger pointed toward his temple); something like that, that he didn't want her to be able to recognize him; that he knew that she would know him, he had been in there on other occasions, and at one time he had gotten by with stealing, I believe it was approximately \$5.00, from this same desk [fol. 157] drawer on one occasion. Then he said he went on home, down this route that was mentioned, to Seventh Street and Trade, where he saw Isiah and had the conversation with him regarding the radio; that he went on down Oak Street to Eighth, from Eighth to Cherry, from Cherry Street he went up onto the White Sand. At that time Clyde stated that he was walking over near some weeds that was

on the side kind of the railroad track; that he went up to his mother's house and went in without anyone seeing and knowing that he was there, to his knowledge; that there he changed his clothes. He stated that the reason he had those clothes there at his mother's was so that he would have a change of clothes somewhere else other than his home, so that he could pull off the clothes that he was wearing when he committed the crime, so that he could not be recognized by the clothing he was wearing; that after he changed his clothes he went on down to his girl friend's house and in a short time after he went down there he came back uptown to pawn the radio for Mattie Mae. That was about the conclusion of that interview.

Clyde told us where he had put the pocketbook. We had made several searches in the community from the radio shop plumb down to the White Sand and all around in that section for the pocketbook. He stated that he had taken the pocketbook, taken a small amount of money from it, placed it in an old tin bucket at the southeast corner of his mother's house near a fence in some tall weeds; that he put a rock on top of the billfold or pocketbook down in some water. Mr. Reid and I together found this billfold at the place that he stated he put it, the billfold that has been identified here yesterday as State's Exhibit No. 2. It had a key in it and had pictures of boys and girls and also had an identification card with Betty Jane Clifton's name on it and other cards.

(At this point the State introduced the pocketbook or billfold and its contents as "State's Exhibit No. 2," the [fol. 158] pair of trousers, previously identified as "State's Exhibit No. 1," and the portable radio, as "State's Exhibit No. 3.")

#### Cross-examination.

In all I talked with Clyde Brown three times with Mr. Reid and myself and one other time I was present, on Tuesday afternoon, at the time Captain Burke, Mr. Reid, I believe Chief Gold, and myself, and I think probably they are the times I talked with him. I was present on Tuesday, the 20th, at the times he was talked with. I talked



with Clyde five or six times; one time, when he was asked to identify the pants, at the time that he was in Capt. Burke's office, on the 20th, the 24th, on the 25th, and again on the 26th. Then I talked with Clyde again on the 27th or 28th, I forget which it was. Part of those conversations would be at the time Mattie Mae would be taken up to see him.

I cannot recall definitely that I talked with him between the 26th and the 28th. I did not talk with him between the 20th and the 24th. I was present on the 20th; I don't recall that I talked with Clyde too much at that time; I was present at the time that he was talked with, mostly by Capt. Burke; that was on the 20th, in the afternoon. The next time after that, that I talked with Clyde Brown, was on the 24th. I was not present when anyone else was talking to him between the 20th and the 24th, that I recall.

On the 24th, Mr. Reid and I were present when Capt. Burke read the warrants to Clyde Brown. After he read the warrants, Capt. Burke left the office, leaving Mr. Reid and me with Clyde; there was no one else in there at that time. After Capt. Burke left, I warned Clyde of his rights and then he made the statement.

During that conversation, Clyde told me that his purpose was to get the young lady away from the radio shop so that he could go in there and steal some money. Again [fol. 159] on the 26th, he told me that his purpose was to go in the radio shop and steal some money; that he had stolen some money there before. I wouldn't say definitely whether it was Tuesday or Wednesday after that that I talked with him again, but I did talk with him again; it was two or three days, maybe two days, after he had given us the second statement regarding what he had done, on Monday. It was on Monday that he gave the statement he said was right, the time I have explained to the Court in detail that he told me what happened up there.

Q. Is there any way you could account for the fact, Mr. Carter, that it appeared in the Winston-Salem Journal on Wednesday that he made a statement such as you describe here, on Tuesday?

Objection—sustained and defendant, in apt time, excepts—Exception No. 20.

I did not know that the public understood that a statement was made on Tuesday instead of Monday. I did not know that the public generally understood that a statement was made on Tuesday instead of Monday.

One of the statements was made on Monday, the last one, and one of them was made on Saturday, the 24th, which was the first statement Mr. Reid and I got from Clyde Brown. On Sunday, Clyde Brown told his girl friend where the pants were, and that is about all he said to us on Sunday. He was talking with Mattie Mae, on Sunday, and she would talk with him some. Clyde went into detail on both of those statements, but the last statement, which was on Monday morning, was the first time he had stated that he assaulted her other than hitting her with the rifle. On Monday, he told me again that his purpose in going in that radio shop was to steal some money.

I was not one of the first officers to go into the radio shop after the call was put in to Headquarters; I was up there [fol. 160] sometime later. At the time the call came in I was in the office at Headquarters, and some little while later I did go to the Clifton Radio Shop; it was probably an hour later before I arrived there; I cannot fix the time of my arrival definitely. The call came in at approximately 12:30, and some little while later instructions were received from Captain Burke that all of us were to be directed to that vicinity and contact him. I would say that was approximately 1 or 1:30.

At the time I arrived at the radio shop I went inside of the shop, and I took part in part of the investigation. The measurements, to which I testified on direct examination, were made some two or three days later. Mr. Reid, Mr. Burton and I were together at that time, and we made the measurements. We also made some measurements on the inside of the shop. The width of the shop on the inside is 14 feet. The distance from the counter or work bench to the back wall is 6.5 feet, and from the shelf of the work bench to the floor is 3 feet. Part of that 3 feet is taken up by the cot which has been referred to here as being part

of the furniture in that room. I do not have the measurements of that cot here, but the height of the cot was approximately 3 inches, or maybe it could be 4 inches; I don't think it would be a little more than that; it was lying flat on the floor, had legs that folded underneath it, lying flat on the floor.

The photograph which counsel hands me is not a correct representation or photograph of the cot under the counter; at the time I saw, the mattress was not on it, the way it is here; there were several other articles lying all around on the floor, and it wasn't under the counter as straight as it is now. I saw the mattress on top of the cot. The thickness of the mattress and the thickness of the cot itself would probably be 6 inches, or maybe 7 inches; I don't think it would be more than that.

[fol. 161] There was some wiring under the work bench. I was not one of the officers who tore away or took away some of the wiring; it is my information that some of it was removed from there. There was some cardboard removed from the counter, but what part of the counter that was taken from, I could not say; I did not take it from the counter and I was not present when it was taken from there; I was informed that; I did not pay any attention to that particular portion of it before it was removed. There were several wires hanging down under the work bench. From the inside, I would say it was approximately 5.5 feet from the floor to the ventilator; I do not know how high it would be from the garage side. The floor level of the garage is lower than the floor level in the radio shop; my best impression is it would probably be 24 inches or more lower than the floor level in the radio shop.

#### Re-direct examination.

The photograph counsel hands me is a correct representation of the back wall of the radio shop, the wall between the garage and the radio shop, showing the opening to which I have just referred, which is a round black-looking opening, also showing the fan. (Photograph received into evidence as "State's Exhibit No. 4," and the Court instructed the jury as follows: "Gentlemen, this photograph is admitted into evidence for the purpose of illustrating the

testimony of the witness, if you find it does illustrate his testimony. (It is not substantive evidence in itself.)

The photograph which counsel now hands me is a correct representation of the area of the radio shop where the cot, about which I have testified, was laying and under the counter at the time I first arrived there and observed it.

The Solicitor: I offer that as State's Exhibit No. 5.

The Court: Gentlemen of the Jury, this is offered for [fol. 162] the same purpose as the other photograph, that is, for the purpose of illustrating the testimony of the witness, if you find it does illustrate his testimony, and not substantive evidence.

Objection—overruled—and defendant, in apt time, excepts—Exception No. 21.

(Said Photograph was received into evidence and marked, "State's Exhibit No. 5.")

Re-cross-examination.

I'll say it was approximately an hour after the attack before I reached the scene, and what happened in the shop in the matter of re-arranging the equipment there in the preliminary investigation, I don't know definitely.

Re-direct examination.

I didn't arrive there until about an hour after the call came in. The condition I have described was what existed at the time I arrived there.

JOHN R. WOOTEN testified: My name is John R. Wooten. I am an officer in the Police Department of the City of Winston-Salem, assigned to the Detective Division.

I was called to the scene of the Clifton Radio Shop on the 16th day of June, and arrived there at approximately 12:40. At that time, Mr. Clifton and Patrolman C. R. Combs of the Police Department were inside the shop.

On my arrival at the Clifton Radio Shop, this barrel of this .22 rifle was found in the Clifton Radio Shop with the stock broken off. At that time it was just in front of the



work bench laying across the corner of a desk. The stock was found behind the work bench, over behind some boxes and radios.

The Solicitor: I offer the rifle into evidence as State's Exhibit [fol. 163] No. 6.

Objection—overruled—and defendant, in apt time, excepts—Exception No. —.

(Said rifle was received into evidence and marked "State's Exhibit No. 6.")

#### Cross-examination.

Mr. Combs is an officer who walks the beat up in that section, or did at that time. Officer Combs and Mr. Clifton were inside the shop at the time of my arrival. I got there about five minutes or so after the call came in. I examined that rifle carefully. I have my initials on there, "J. R. W.", that I put on there. When I examined the stock or butt of that rifle I didn't notice any old split in it; to my way of looking at it, that could have been done at the same time as this, so far as I know; there are no tape marks on there to show that that stock was split and was sort of taped together, and there was no tape on it at the time we found it; it was just like it is now, at the time we found it; I would not identify that as tape marks on there; I don't know that they are tape marks; it is possible that that is an old break, I don't know; Mr. Clifton did not tell me that was an old break.

#### Re-direct examination.

State's Exhibit No. 5 correctly illustrates the condition that existed within the radio shop and under the counter of the radio shop when I arrived there.

The Solicitor: Now, your Honor, unless there be some misunderstanding, I desire to introduce this rifle as State's Exhibit No. 6 and the rifle butt as State's Exhibit No. 7.

(The rifle barrel was marked "State's Exhibit No. 6," and the rifle butt was marked "State's Exhibit No. 7)."

[fol. 164] To my knowledge, there had been nothing moved within the radio shop between the time I arrived

there and the time Mr. Carter arrived there. I don't recall just when Mr. Carter did arrive, we were so busy. At the time I arrived there, officer Combs was in the shop with Mr. Clifton and was keeping everyone out of the shop.

#### Re-cross-examination.

When I arrived, Miss Clifton had already been taken to the hospital. The only thing I know about what changes took place in the arrangement of anything under the counter or around the counter in getting her ready to be removed to the hospital, is what Mr. Clifton told me.

THOMAS E. CLIFTON, recalled to the witness stand by the State, testified: State's Exhibit No. 5 is not a correct representation of the area of the radio shop, the cot and so forth as it existed at the time I first went in the shop. The mattress was laying level on there, just raised a little bit in the back, with my daughter under it. At that time I pulled the mattress off of her. That photograph, State's Exhibit No. 5, does correctly represent the condition as it existed there after I had removed the mattress from my daughter and after she had been removed from the cot; it looks just like it; the mattress is over here (indicating on photograph).

#### Cross-examination.

That photograph shows the cot as it usually is. There is wiring that goes to each one of the sockets there, one runs across over to the outside socket, and one runs from the first socket over to the front. The cardboard did run all the way across the front of that counter.

That rifle was mine; I have had it about two years; I traded with a fellow named Flynt. I did not know if the [fol. 165] rifle had a crack in the butt of it; I never remember seeing it cracked nowhere at all; it was in perfect condition; you can't tell by looking at it, what kind of crack it is.

C. R. Combs testified: My name is C. R. Combs. On the 16th of June of this year I was serving on the Police Force of Winston-Salem, and was working a patrol beat in the North Trade Street area; my hours were from 7 in the morning to 3 in the afternoon.

An ambulance came to the Clifton Radio Shop and I went to it; I was not called, I just went to it. When I arrived there at the Clifton Radio Shop, Mr. Clifton and the ambulance attendants were there and several more people just gathered up from on the street; Mr. Clifton and the ambulance attendants were in the shop and the other people were on the outside. I did not go inside until after Mr. Clifton and the ambulance attendants left. They brought the little girl out on the stretcher, and I then went in the shop. No one else was permitted in the shop until Mr. Reid came; Mr. Reid was the next man permitted in there; then there was no one permitted in there besides Mr. Reid until Mr. Wooten arrived there. I stayed on duty and no one but Police Officers were allowed in the shop, except Mr. Clifton and the ambulance attendants.

The photograph counsel hands me correctly represents the radio shop and the area immediately under the counter as it existed there at the time I arrived there.

The photograph correctly represents the rear of the building of the radio shop at the time I arrived there.

I took over the duty of keeping people out of there.

[fol. 166] Cross-examination.

The condition I found on arrival was just as it is pictured there (State's Exhibit No. 5), the bedding and all tumbled up just like that, and the mattress thrown out in the floor right in front.

I remained there until Mr. Reid arrived. Mr. Reid was the first officer to arrive after I got there. Mr. Reid arrived about two or three minutes after I got there; I wouldn't say just definite to the minute. I stayed there for two hours after Mr. Reid arrived on the scene. I taken care of the door and seen that no one entered the building except the Police Officers on duty. I was about 50 yards from it at the time the ambulance pulled up. I was right on Seventh and Trade, across Trade from it.

and I saw the ambulance when it pulled up, and I hurried over to it.

I saw Mrs. Grossman in the place there; she is the lady that runs the record shop across the street. The young lady was being brought out to the ambulance, the first I saw of her; and Mrs. Grossman was on the sidewalk in front of the place. That was a little after 12:00 o'clock; I wouldn't say the exact minute. I didn't make any notation of the exact minute. I didn't go back later that day; I never did leave; I remained there a couple of hours; I did not go back in the afternoon, after I left. I was back by there the next day, probably; other officers were there when I come by.

The State rests.

Mr. Price: Your Honor, before the State closes, I would like to call Mr. Reid back to the stand for a couple of questions.

The Court: All right, sir.

[fol. 167] W. E. REID (recalled) to the witness stand by the defendant, with permission of the Court:

#### Examination by Defense Counsel:

I was not more or less the chief investigator in this. Our assignments are arranged so that the next man out answers the call, and I happened to be the next man out when the call came in; I was sent, of course, immediately to this place. The case was assigned to all the Detective Division, and Captain Burke and Chief Gold were the chief investigators; we work under them and with them. I was busy doing something regarding the case from the time I went there shortly after this incident until the case broke, but there was an awful lot of work that went on that I wasn't in on.

When I first got to the radio shop, I expect I stayed there one minute, not over two minutes. After I left the hospital I did not go back to the radio shop that day; I went back about two days later; I don't recall whether I went back to the radio shop the next day or not, but the



next time I recall going back is the day I went back with Mr. Carter and Mr. Burton and took measurements, as Mr. Carter testified to a while ago.

I was not present when the shop was dusted for fingerprints; the only thing I know about that is what I have heard; I heard that it was dusted for fingerprints; I know who dusted for fingerprints only from what I have heard.

Mr. Price: Your Honor, may I have Mr. Wooten back on the stand, just for a question?

The Court: Come back around, Mr. Wooten.

J. R. WOOTEN (recalled) to the witness stand by the defendant, with permission of the Court:

[fol. 168]

Examination by Defense Counsel:

I was present when the shop was dusted for fingerprints. We covered more or less every area of the shop; our attention was drawn to certain parts of it more than others. The rifle wasn't dusted at the shop; it was dusted in the laboratory; they did not find any fingerprints on there of the defendant, to my knowledge.

Q. It was dusted, really, more than once, wasn't it, tried, they tried to find the fingerprints of the defendant on the rifle—Is that right?

A. I couldn't say about that.

If they ever found the fingerprints of the defendant on that rifle, I haven't heard anything about it; I don't think that they did. Of my own knowledge, I don't know that the defendant's fingerprints were taken; as a routine, they do; I don't know that they took his fingerprints several times; I just never saw them take them. I did not find his fingerprints anywhere in the radio shop.

Examination by the Solicitor:

Q. Can you get a fingerprint from a rifle that is being swung like that, Mr. Wooten?

Objection—overruled—and defendant, in apt time, excepts—Exception No. 22.

A. This rifle was practically covered entirely by blood.

The Court: Is there anything further from the State?

The Solicitor: That is the evidence, your Honor. I had rested.

At the close of the State's evidence the defendant moves [fol. 169] for judgment as in the case of nonsuit. Motion denied and defendant, in apt time, excepts—Exception No. 23.

### Defendant's Evidence

DR. HARRY W. GOSWICK testified for defendant; I previously testified that on my pelvic examination of Miss Clifton on June 2 I found there was a recent tear, not "fresh." Fresh would mean, done, within a few hours. Recent is what I said.

Q. Now, whatever condition you found there, it was a tearing; I believe you said, exactly, "Pelvic examination reveal a quarter of an inch tear in the lower midline of the juncture of the labia"? That was, to be exact, about eight days from the 16th of June?

A. That is right.

Q. —from the date on which the young lady was assaulted or injured?

A. That is correct.

Some healing takes place in that time. There is not sufficient healing within a period of eight days that I can't determine whether the condition I found was recent or not; it depends upon the location of the wound. A non-infected wound would heal up in two or three days and only leave a small scar, but in a place where it obviously gets infected, such as this was, it will not heal up as soon. The rupturing of a hymen does not necessarily heal very quickly; sometimes it remains sore for a pretty good while. Soreness is something you can only get at from history given by the patient; you can't see soreness. Ordinarily, in a patient who is conscious, the rupture of a hymen heals very quickly, in a matter of a day or two; that would have a lot to do with it, on account of the personal hygiene; [fol. 170] they would take care of themselves better if conscious. This patient was being taken care of in the hospital. This condition did not need medication. There

is a difference in personal hygiene and medication. Of course, she got baths, but she was unconscious, and she was continually voiding in the bed, and naturally, she would stay infected some, longer than if she had been conscious.

I do not recall the exact time of day I made my vaginal examination of Miss Clifton; I think it was in the morning, possibly 9 or 10 o'clock in the morning.

Q. Doctor, isn't it one of those sort of academic things that in a case like this, where you even suspect there has been an assault or rape, that you record accurately the time of day and the date and all that sort of thing, very accurately?

A. It isn't necessary.

Q. It isn't necessary, but it is sort of one of the academic requirements?

A. I don't know what you mean?

Q. Isn't it one of the cardinal rules the doctors go by?

A. No, not to my knowledge, it isn't.

Q. You have never been taught that?

A. No.

(No cross-examination).

MRS. JOSEPH GROSSMAN testified: My husband and I operate the record shop just across the street from the Clifton Radio Shop, and we were operating that place of business on June 16th.

Mr. Clifton drove up in his truck, and we had a radio [fol. 171] in his shop to be repaired, so my husband said, "I think I'll go over and see if Tom has my radio repaired," and he ran across the street. In a few minutes my husband came out motioning for me to come there, then motioning for me to stay back, and then motioning for me to come there, and so I went on over there, and I saw Mr. Clifton come rushing out and go into the garage, evidently to telephone—I didn't know what he was going there for, but he did telephone for first aid, ambulance and everything. I went in there and I heard a noise, just an animal-

like noise, you might say; that is all she could do, because her mouth was closed; she had a very small mouth; both eyes were closed, with one, you could barely see that it was grey, and one side of her face was huge. I didn't know what had taken place.

I got there a good deal of time before the ambulance did. Mr. Clifton and I were the only two persons with the young lady, and Mr. Clifton was busy telephoning, trying to get the ambulance there, and I was busy getting wet towels to put to her ears to try to stop the blood from flowing. The blood was just pouring out both ears and just all over her, and I was bloody from my shoulders to my hands from helping.

Betty Jane Clifton had on ballet slippers, and one of those was missing, and the skirt was very wide, white, and it had flipped up in back when her father took the mattress off of her and put it over there.

Q. Will you please tell his Honor and the jury, was her clothing intact except for the absence of the slipper that you say was missing?

A. To the best of my knowledge. I saw nothing—

Q. Was there any dirt on the back of her dress at all? [fol. 172] A. No, I didn't see it.

Q. Didn't see it? Was her underclothing intact?

A. Absolutely.

Q. —and pulled up on her?

A. I noticed that because she—I don't think she was wearing a slip, speaking frankly, and the dress was of a thick material, and very wide skirt, and she didn't need it to, you know, protect her from view, and it just flipped up, the back of her skirt had just flipped up, like that (witness moved hand in upward sweep), and I saw the back of her panties, if that is what you want to know. I saw her panties, but I saw nothing on them.

There was no blood or anything on her panties. The only blood I saw was up here, on her head. Her panties were pulled up in perfect position.

My husband was the second one in there; he saw her and he called me, because he can't stand things like that, men can't, and so I went over to do all I could for her, and I tried stopping the blood with cold wet towels, and I



had several in my shop, and I told my husband to go get the towels and wring them out, not too dry, so that I could stop the blood from flowing, and, too, there was a hole here (indicating left temple) in her head, besides her ear being split.

I remained with her until the ambulance came and they took her away. Then I left and went back to my place of business, because I had to wash up; I was just about as bloody as she was.

My husband and I have operated that shop there about four or five years, ever since the place was built.

[fol. 173]

### Cross-examination.

When I got there, it didn't seem like blood was everywhere; it was just at the head; it wasn't all around on the floor, because I would have slipped on it, because I had on rubber-soled shoes. I don't remember seeing blood on the floor. I don't remember seeing any blood on the mattress, because her father lifted the mattress over and then he lifted her over on the mattress, from the springs. She was face down on the springs, and that was the only thing that saved her life, because the air got to her through those coil springs; she would have smothered, otherwise. I did not get there before her father got there.

I saw her father drive up out in front and he had barely stepped inside when he came rushing out and sounded an alarm to my husband. My husband, Mr. Grossman, was partly across the street at that time and he hollered to Mr. Grossman. My husband stood still and made signs; he was dumbfounded; he made signs first one way and then another; he was completely all to pieces. Mr. Clifton had dashed to the garage around there to the telephone, and when he came rushing back he was all to pieces; he wasn't screaming for help; he was not begging for help; he was just, well, he was crazy—you know what I mean. I told Mr. Clifton to wring a towel out with some water, and he wrung it out so dry there was no water in it, and I had to tell him to put some water on it so I could put it to her ears. I don't know if the blood was strewn with the towels between the sink over in the corner and where she was lying

on the mattress; I had three towels. I had blood just on my arms; I had on a sleeveless dress; I had no blood on the front of my clothes, just on my arms, because I just touched her head.

Q. Did you see her before her father moved her?

A. Yes.

Q. Did you see her before her father moved the mattress?  
[fol. 174] A. Yes—No, No, No.

Q. What?

A. The mattress had been moved.

The mattress had been moved on the floor. The mattress was lying on coil springs on top of her; in other words, she was sandwiched between the coil springs and the mattress. She was not lying prone and not moving in any way; she was like that (witness illustrates squirming motion) kind of; moving when she could, but she was groaning, trying to attract attention, evidently wanting to. She recognized her father's voice, no other, and she would not make any noise, except when her father spoke, but she knew absolutely nothing that was happening.

Mr. Clifton wrung out one towel, my husband wrung out one towel and there were three towels used; I had to get Mr. Clifton to wring his out the second time because he was so nervous that he got all the water out of it. What I wanted was cold water to try to coagulate the blood that was flowing from her ears.

Her dress was just flipped up around her waistline, just the hem of it; from her hips down, she was exposed; she was on her face; she had been laid over on her face, and her dress was up on her back, and her whole body was exposed from her hips down; I did not see the front; I just saw the back; I saw her whole back; it was a dress that was very low cut in the back. I am not strong enough to turn her over; her father turned her over when he came back from telephoning. When her father turned her over her skirt was in the same place it was, because I have always been taught never to touch a thing until the officers arrive; I was touching her, but only in an effort to stop the blood; I was not touching everything else in that shop. I walked right back there where she was; I didn't move from that place until the ambulance came, and then I

walked out into my shop to wash up. I absolutely was [fol. 175] paying special attention to where I put my hands to see that I didn't touch anything besides Miss Clifton, while I was in that shop. There is one thing I did do: Her neck was swelling, and as she had a brown velvet band around her neck, I untied that and threw it up on the counter, and the little velvet band was shown in one of the photographs that was in the paper.

Betty Jane's dress, when she was turned over, was okay, so far as I am concerned; I mean, it was not torn, was not ripped, wasn't dirty, wasn't messed up; it was down. Those ballet skirts, they can flip up in the back and yet remain down in the front. I saw the little girl with her dress up, lying on her stomach. I didn't pay much attention to her after her father turned her over, except to keep putting towels to her head; her dress was down in front; I saw nothing at all of her undergarments from the front.

#### Re-direct examination.

Before her father turned Betty Jane over, I observed all of the back part of her body, and I saw no blood emitting from any part of her body except from her head; the only place I observed blood was from her head. When I first saw her, she was on her face, and the dress was up over her back, and her whole back part was exposed, to her waistline; I saw all of the lower part of her buttocks. Her underclothing was absolutely intact then. I did not see any blood emitting from her lower parts; the only blood I saw was from her head. When her father turned her over, I had no opportunity to observe the lower part of her body then.

I have no interest in this matter at all other than to come here and tell the truth, except I don't want the girl to have the stigma of rape on her for the rest of her life. You came in my shop to buy a record, I think it was Friday of last week, Mr. Price, and I didn't know you from Adam.

[fol. 176] T. D. COPPEDGE testified: I operate the Piedmont Photo Service. At the request of defense counsel I

took some photographs at the Clifton Radio Shop a few days ago, I believe day before yesterday.

The photograph you hand me is a photograph of a portion of the shop that I took. This is also one of the photographs I took over there on that occasion. This photograph shows a radio repair table and a mattress and springs underneath. The gentleman in the radio repair shop said that was the position of the cot; I don't know that he said when. I believe we asked him whether or not the wires were hanging down there or whether or not he wanted to remove them or something like that; he said those wires hung down there like that.

#### Cross-examination.

The cot was under the counter when I got there. I understood from the gentleman in the shop that that is where they always kept it or where it was on this day in question, anyhow.

(The photographs referred to were received into evidence as "Defendant's Exhibits Nos. 3 and 4.")

GOHEN JEFFERS testified: I went to Clifton's Radio Shop on Tuesday, for the purpose of making certain measurements at request of defense counsel. I have my notes with me. The distance from the work bench to the back wall of the radio shop is 6 feet 10 inches. I did not make a measurement of the distance from the top of the work bench to the floor. I measured the distance from the top of the work bench to the top of the cot; that distance was 2 feet. I did not measure the whole distance of the work bench from the wall to the entrance. I did not measure the length of the cot; I only measured the height of the cot. The distance from the floor to the top of the cot was 8 [fol. 177] inches, mattress and all. I did not measure the width of the shop in there, because I couldn't get around very well in there. There wasn't but one gentleman in there, and he didn't have time to help me; he offered to, after I got almost through, but he was busy before that; he told me it was between 12 and 14 feet wide.



Cross-examination.

I don't know anything about how the shop was arranged on the day in question; I only know about the day I was up there, which was last Tuesday. I didn't know anything about any adjustment of the bench to make more room for the desk up there; I didn't know anything about what had been done in there, or whether it was in there. From the work bench to the wall measured 6 feet 10 inches, and the cot was under the work bench. From the top of the cot with the mattress on it, it was 2 feet from the mattress up to the work bench, the top of the work bench. It was 8 inches from the floor to the top of the mattress, and 2 feet from the top of the mattress to the bottom of the work bench. I did not measure the distance from the bottom of the work bench to the top of the counter.

Mrs. Young testified: I live on West Twelve-and-a-Half Street, about a half a block from Clyde's mother. I have been knowing Clyde Brown ever since he was about 7 years old.

Q. Tell his Honor and the jury what kind of a person he is?

Objection—sustained—and defendant, in apt time, excepts—Exception No. —.

Q. Do you know his general reputation?

A. All I know, he was good, as far as I know it.

[fol. 178] Q. First, answer, Mrs. Young, do you know his reputation?

A. Well, all I know, he was a good boy.

Q. Good boy?

A. I never knowed him to do nothing wrong.

Q. Quiet sort of person?

Objection—sustained—and defendant, in apt time, excepts—Exception No. —.

I have known him ever since he was about 7 years old.

Cross-examination.

I don't know how long he has been left there from his mama. I don't know that he left there and went down to

live with Mattie Mae, his girl friend; I was working. I do not know about when it was he left his mother's. Every time I seen him he was at his mother's house. I don't know nothing about the girl. I didn't know anything about him coming by; the only time I ever seen him he was on his mother's porch. I didn't know about him being in High Point; I thought he was at his grandmother's house; I don't know where his grandmother lives—I understood she lived in Lexington; I don't know because I ain't never been down there. I don't know anything about any trouble; I didn't know he was in High Point. I don't know of any reputation he might have regarding High Point; I ain't never been to High Point.

Clyde worked down there at the produce place, is all I know. I don't know how long it had been since he had worked before this offense.

I ain't no friend; I just knowed him, that is all I know; I ain't no friend to nobody.

Defense counsel offered into evidence the Hospital Rec-[fol. 179] ords previously identified, marked "Defendant's Exhibit 1" and "Defendant's Exhibit 2."

The defendant rests.

#### STATE IN REBUTTAL

NANCY STRADER testified: On the 16th day of June of this year I was a nurse at the City Memorial Hospital, head nurse on Men's Ward, but when this emergency came in, Miss Cheek called me to the Emergency Room.

I saw Betty Jane Clifton shortly after she arrived; she wasn't undressed in the Emergency Room. At the time I saw her, her blouse was open; there was one button buttoned, but the rest of the buttons were open; her pants were bloody.

Q. What about the condition of the thigh region?

A. Well, her pants were bloody.

Q. Her pants were bloody?

A. Yes.

Q. What about any blood inside of her legs?

A. There were some smears, but her hands were bloody, too, so I don't know where it was from.

Mr. Price: I object to the leading.

The Court: Don't lead her.

Q. There were some smears inside?

A. Yes.

There is nothing else that I know about the condition of her clothing or her thigh region that I observed particularly, about which I haven't testified.

#### Cross-examination.

Betty Jane Clifton had on a skirt and a blouse; I haven't the slightest idea how many buttons there were to the [fol. 180] blouse; it was buttoned by one button, but I don't know how many buttons there were, whether it was a one-button or two-button blouse; I don't think hers had only one button; I know it had more than one button, but I cannot say how many buttons there were to the blouse. I don't know what kind of skirt that she had on; it was a cotton skirt; I don't remember what color it was, but I believe it was flowered. I don't know what kind of shoes she had on. She did not have on any hose.

I observed blood on her underclothing. I don't believe she had on a slip, but I am not certain about that. I think what I have been telling you is the truth. I don't know where the blood came from that I saw. The upper part of her body was pretty well saturated with blood.

I worked with her there in the Emergency Room. I did not stay with her until she was removed to a ward. She was carried to x-ray from the Emergency Room. I worked with her in the Emergency Room about two hours.

Q. Working with her two hours there, you can't give the Court any better idea than you have already given as to what her clothing consisted of?

A. Well, I wasn't interested in her clothing; I was interested in her condition.

It was partly my duty to observe that she had blood, as I have testified, on her panties. If there was any more blood I would have told you so. There was blood stains on her other clothing, on the upper part of her clothing.

I did not go to the ward with her at all. I do know who her nurse was. I was the head nurse on Men's Ward. My best impression is that that was a flowered skirt.

[fol. 181] Re-direct examination.

Betty Jane Clifton was never admitted to my floor. I believe the panties she had on were pink; I am not sure whether they were cotton or not; they were these little tight-fitting, short ones, very short. When I saw them, her panties were rolled from the top; I don't know whether that was in moving her or not.

Re-cross examination.

If they were rolled from the top, I don't know how they got rolled.

CAPTAIN JUSTUS TUCKER testified: I am the head of the Identification Bureau of the Police Department of Winston-Salem. I went to the Clifton Radio Shop on this day in question to make an examination for fingerprints. I arrived and reported to Capt. Burke. In consequences of Capt. Burke's instructions, I fingerprinted the entire shelf, the work bench, also underneath the work bench, that is, all wooden parts and surfaces; there were several large splinters of wood lying on the floor back of the bench, which I powdered and dusted; I dusted a small desk just in front of the work bench, just to the left going out, the drawer to that; I dusted approximately five or six radios. My results were negative; I found no fingerprints or any signs of fingerprints of anyone. The dust and grease and dirt nullified the effort of the powder; the powder would not reach the surface.

As to my training in fingerprint work, I have had 12 years of experience with the local bureau, both as working under Captain Simpson and also for the past eight or nine years in charge of that bureau. In addition to that, I belong to the North Carolina and International Association for Identification, past-president of the State organization. I have also received training from the Federal Bureau of Investigation at Washington. (Captain Tucker



was admitted by defense counsel to be a fingerprint expert, [fol. 182] and it was so found by the Court).

A hard, clean, smooth surface is required from which to get a fingerprint. I did not examine the gun for fingerprints; the gun was almost practically covered with blood, had a rusty, dirty appearance.

#### Cross-examination.

The gun came into my possession for examination at the Clifton Radio Shop. I went to the Clifton Radio Shop on the 16th in the company with Captain Burke and the investigating officers. I was one of the first officers to handle the gun.

Q. When you say it was almost covered with blood, you mean the butt, not the barrel? - You don't mean the barrel of it?

A. There were red splotches and streaks of blood, yes, sir.

I did not dust the barrel and ejector and all that for fingerprints; that was covered with blood, too, the barrel, as well as the butt. I never took the fingerprints of the defendant; someone in my department took them; I don't know how many times they were taken, as I was out of the city; I don't know whether his fingerprints were taken more than once. I never went back to the Clifton Radio Shop after I had dusted unsuccessfully for fingerprints on the 16th.

The State rests.

#### DEFENDANT'S MOTION FOR JUDGMENT DENIED

At the close of the evidence, the defendant renews his motion for judgment as in the case of nonsuit. Motion denied and defendant, in apt time, excepts—Exception No. 24.

#### ADMONITION TO JURY

The Court: Gentlemen of the Jury, the evidence has been completed in the case. However, don't make up your minds about this case until you have heard the argument of [fol. 183] counsel, the charge of the Court, and retire to your room to make up your verdict. In the meantime,

don't discuss the case among yourselves; don't allow anyone to talk to you about it. Sheriff, take a recess until 1:45! .

(Recess was thereupon taken to 1:45 P. M. at which time argument of counsel was begun).

(At 4:29 P. M. the Court addressed the jurors as follows):

The Court: Gentlemen, I will leave this matter up to you. We can finish this afternoon by running late—I mean, we can finish with the charge and give the case to you gentlemen, you can eat and come back and consider it tonight, or we will adjourn to in the morning and finish it in the morning. I want to handle it to your best convenience and satisfaction. If it is satisfactory with you, we will proceed this afternoon.

(The jurors indicated their desire to continue with the trial. Thereupon, the Court charged the jury as follows):

#### JUDGE'S CHARGE

Gentlemen, the defendant, Clyde Brown, is on trial on the following Bill of Indictment: "The Jurors for the State Upon Their Oath Present, That Clyde Brown, late of the County of Forsyth, on the 16th day of June, in the year of our Lord one thousand nine hundred and 50, with force and arms, at and in the County aforesaid, unlawfully, wilfully, and feloniously did assault one Betty Jane Clifton a female, and her the said Betty Jane Clifton, unlawfully, feloniously, by force and against her will did ravish and carnally know against the form of the statute in such case made and provided and against the peace and dignity of the State."

[fol. 184] To this charge the defendant has entered a plea of not guilty and asks that you return a verdict of not guilty in this case.

Now, a bill of indictment, gentlemen, is simply a written accusation, in which is set forth an alleged criminal offense, here, rape, and in which is named a person who is

alleged to have committed that offense, here, the defendant, Clyde Brown. The bill of indictment is merely the machinery by means of which a person is placed upon trial, and it is not evidence of any kind bearing upon the question of the guilt or innocence of the defendant. So the fact that the defendant is now on trial on this bill of indictment is not to be considered by you as evidence of any kind bearing upon the question of his guilt or innocence.

Now, under this bill of indictment you may return one of six verdicts, as you may find the facts to be under the law which the Court will give you. First, you may find the defendant guilty of rape as charged in the bill of indictment; second, you may find the defendant guilty of rape as charged in the bill of indictment with a recommendation for life imprisonment; third, you may find the defendant guilty of assault with intent to commit rape; fourth, you may find the defendant guilty of an assault with a deadly weapon; fifth, you may find the defendant guilty of an assault on a woman, he being a male person over the age of 18; and sixth, you may find the defendant not guilty.

Under his plea of not guilty the defendant is presumed to be innocent and the burden of proof rests upon the State to satisfy you fully from the evidence, beyond a reasonable doubt, as to his guilt. This presumption of innocence remains with and about the defendant throughout the trial, the State having the burden of satisfying you, beyond a reasonable doubt, as to his guilt before you may return a verdict of guilty of any offense whatsoever.

[fol. 185] A reasonable doubt, gentlemen, is not a vain or imaginary or fanciful doubt or a mere possibility of a doubt, but a reasonable doubt is a doubt based upon reason and common sense, arising from the evidence or lack of evidence in the case; and the Court charges you now that you will not return a verdict of guilty of any offense under this bill of indictment unless from your consideration of the evidence and the facts and circumstances disclosed by the evidence you have an abiding conviction to a moral certainty as to the guilt of this defendant.

The defendant, by his plea of not guilty, not only denies the charge or charges made against him, but also denies and challenges the credibility of each and every part of

the testimony upon which the State is seeking to obtain a conviction.

So it becomes your duty as a jury to weigh the evidence and determine therefrom what are the facts. In doing that you will pass upon the credibility or worthiness of belief of each witness and determine what weight, if any, you will give to the testimony of each witness. You may take into consideration the reasonableness or the unreasonableness of his testimony, his interest or lack of interest in your verdict, his manner or demeanor upon the witness stand, his knowledge or lack of knowledge or his opportunity for knowledge or lack of opportunity for knowledge concerning the subject of his testimony, or any other factors that suggest themselves to your good judgment and common sense to enable you to pass upon the credibility of the witness and determine what weight, if any, you will give to the testimony of that witness. You may believe all of what a witness says, you may believe a part of what a witness says, or you may believe none of what a witness says, that being a matter entirely for you to determine.

In this case the defendant did not go upon the stand to [fol: 186] testify in his own behalf. Our law is emphatic that a person on trial for a criminal offense may or may not testify in his own behalf, accordingly as he may elect or as his counsel may advise, and our law is equally emphatic that his failure to testify shall not create any presumption against him.

There has been some testimony in this case with reference to the good character of this defendant. Character testimony with reference to the defendant is substantive testimony, that is, it goes directly to the issue as to his guilt or innocence. A person of good character being less likely to commit an offense such as the defendant is here charged with committing.

The Court in this case, gentlemen, will not attempt to recapitulate or review all of the testimony in the case. The Court will refer to the testimony in stating the contentions of the State and the defendant. The Court cautions you, however, that you are the triers of the facts. You should consider all of the testimony in the case. If your recollection of the testimony differs from that of the



attorneys who have argued the case or from the Court, you take your recollection and not that of the attorneys nor of the Court. In stating the contentions of the parties, the Court cautions you that the Court is not expressing any opinion nor any intimation of opinion as to what the testimony might show, that being a matter entirely for you gentlemen to pass upon and determine.

The defendant in this case is charged with the crime of rape. Rape, at common law, is the unlawful, carnal knowledge of a woman under the age of ten years, forcibly and without her consent, or, as it is otherwise expressed, by force, or forcibly and against her will. Rape has also been defined generally as the act of having carnal knowledge, by a man, of a woman, forcibly and against her will, or without her conscious permission, or where permission has been [fol. 187] extorted by force or fear of imminent bodily harm. Three elements, at common law, were necessary to constitute the crime of rape, namely: Carnal knowledge, force, the commission of the act of carnal knowledge without the consent or against the will of the woman ravished.

Our Legislature has provided as follows in this connection: "Every person who is convicted of ravishing and carnally knowing any female of the age of twelve years or more by force and against her will, or who is convicted of unlawfully and carnally knowing and abusing any female child under the age of 12 years, shall suffer death: Provided, if the jury shall so recommend at the time of rendering its verdict in open court, the punishment shall be imprisonment for life in the State's Prison, and the Court shall so instruct the jury."

In accordance with that act, the Court instructs you now, gentlemen, that if from this evidence you should find this defendant guilty of rape, you may, at the time of rendering your verdict in open court, recommend life imprisonment, and that will automatically reduce the punishment for that offense from death to life imprisonment.

Our Legislature has also provided this in cases of this kind: "It shall not be necessary upon the trial of any indictment for the offenses of rape, carnally knowing and abusing any female child under twelve years old, . . . to prove the actual emission of seed in order to constitute

the offense, but the offense shall be completed upon proof of penetration only." While actual penetration is necessary in order to constitute this offense, no particular depth of penetration is required. The least penetration is sufficient, and the emission of seed is unnecessary. The least penetration of the person of a female against her will is sufficient to constitute rape. There are no degrees in the [fol. 188] crime of rape, but in proper cases the person charged in the bill of indictment may be acquitted of the capital felony and convicted of a less degree of the same crime. The term "proper case" is used to indicate those instances which the law and the facts will warrant a conviction of a lesser offense of the crime charged.

In this case, Gentlemen of the Jury, the State argues and contends that you should return a verdict of "Guilty of rape as charged in the bill of indictment," the State arguing and contending that on this 16th day of June 1950, that Betty Jane Clifton was in charge of her father's radio shop here in the City of Winston; that shortly before or about the noon hour this defendant entered the shop; that he attempted to take a pocketbook or did take a pocketbook from a desk drawer there on the premises; that he was detected in taking it and that Betty Jane Clifton then screamed; that this defendant then took hold of Betty Jane Clifton's throat with his left hand and that he pushed her down, holding her with his left hand around the throat and that with his right hand he pulled her underclothing down and at that time, as the State argues and contends, the defendant inserted his male organ into the female organ of Betty Jane Clifton, that he pushed a number of times; that it kept slipping out and he kept re-inserting it until he was finally satisfied.

The State arguing and contending that the defendant then started to leave the Clifton Radio Shop; that as he started to leave the young girl, Betty Jane Clifton, screamed; that thereupon he went back and hit her a number of licks with the rifle which has been introduced in evidence in this case, the State arguing and contending that the defendant, after he had committed the crime of rape, attempted to and intended to, so the State argues

and contends, kill the prosecuting witness so that he would not later be recognized.

[fol. 189] The State arguing and contending that shortly thereafter, the father of Betty Jane Clifton found her lying on the cot in the radio shop with a mattress thrown over her; that she was immediately taken to the hospital; that she was severely, painfully, and critically injured, as the State argues and contends; that she remained in the hospital for a period of about a month in a semi-conscious condition, remaining in the hospital until about August 10, when she was discharged.

The State arguing and contending that by reason of those blows inflicted upon her at that time that she suffered a lapse of memory and does not know what happened to her on this occasion, the State arguing and contending, however, that the evidence in this case is sufficient to satisfy you, from this evidence and beyond a reasonable doubt, that this defendant did actually rape Betty Jane Clifton on this occasion, the State arguing and contending that the statement made by the defendant, himself, is sufficient for that purpose, the State arguing and contending that the defendant admitted that he placed his private organ into or against that of the prosecuting witness, Betty Jane Clifton, and that he did this a number of times, and that after placing it therein that he pushed against her and that as it slipped out that he re-inserted it.

The State arguing and contending that in addition to the statement of the defendant that Dr. Dale, a practicing surgeon, who at the time was Assistant Resident Surgeon at the City Memorial Hospital, saw Betty Jane Clifton soon after she was taken to the hospital; that shortly after arriving there, within some three hours, that he made some examination of her female organs; that at that time she was bleeding, bright blood trickling from her female organs; that in his opinion as a medical expert that there had been a penetration by some object into her female [fol. 190] organ.

The State further arguing and contending that at the same time the nurse, Miss Strader, who was on duty in the Emergency Room at the Hospital, saw Betty Jane Clifton;

that she had blood on her underclothes, on her pants; that she had smears of blood upon her legs;

The State further arguing and contending that Dr. Dale on his preliminary examination when she arrived at the hospital, found bruises on the inside of her legs; that he found bruises upon her hips as well as the blows or wounds which he found about her face and head, skull fracture, fracture of the jaw, and the other injuries which he has described; the State arguing and contending that no further thorough examination was made at that time because of the fact that the girl's condition was so critical that the doctors and nurses were more interested in saving her life at that time than in making any further examination to determine whether or not she had been raped;

The State arguing and contending that some eight days later, on the 24th day of June, ~~that a thorough examination was made by Dr. Goswick;~~ that at that time a laceration was discovered and her hymen was found to have been punctured and that from this examination that Dr. Goswick is of the opinion that there had been a penetration;

The State, therefore, arguing and contending that based upon the statement of this defendant, based upon the testimony of the two doctors and the nurse, that you should be satisfied, and satisfied beyond a reasonable doubt, that there was a penetration;

The State further arguing and contending that the statement as finally given to the officers by this defendant, is true; the State arguing and contending that it has been checked as to the various details recited by the defendant; [fol. 191] that this defendant was warned of his rights; that he was told that he need not make a statement unless he desired to do so, that it could be used in court for or against him, but that, voluntarily, he made various statements, first denying any connection with the crime whatsoever; next, admitting that he had been there but denying any purpose or any act other than the purpose and act of taking what money he could find; finally, as the State argues and contends, sending for the officers and telling them that he had not told them the truth, that it was preying upon his mind and that he wanted to tell the complete story; the State arguing and contending that at that



time he did tell a full and complete story and that that story represented the true facts in this case; that he told where the pants were hidden, and that as the result of that the pants were found where he said that they were hidden, and that the pants were examined by an agent of the Federal Bureau of Investigation and human blood stains were found upon said pants; that he told where the pocketbook was hidden; that no person other than the one who actually hid the pocket book would have been in position to have told where it was; that it was hidden in a bucket of water, held down by a rock, in the weeds near a fence at his mother's place, and that the officers went there and found the pocketbook hidden as described by the defendant, and that that pocketbook has been identified by Betty Jane Clifton as being the pocketbook which she had with her on this occasion;

The State, therefore, arguing and contending that the story of the defendant is corroborated by the finding of these objects in the places where he says he had left them;

The State further arguing and contending that the defendant's actions showed on this occasion that he was guilty of a more serious crime than that of larceny; that had he [fol. 192] gone there only for the purpose of stealing the pocketbook and what money he could find and had he only stolen the pocketbook, that he would not have attempted to have killed or permanently disabled Betty Jane Clifton, as he stated he did, but that he would simply have snatched the pocketbook and run; that he would not have committed, as the State argues and contends, such a serious and such a dangerous assault upon the prosecuting witness simply to hide a crime of larceny, but that the assault and the infliction of the blows was caused by a desire on his part to hide a more serious crime and to avoid detection of that crime, that crime being, as the State argues and contends, the crime of rape;

The state further arguing and contending that this defendant would not have taken such care to have dyed his shoes, to have hid his pants, and taken the other steps which he did take, as the State argues and contends, to avoid detection for the simple crime of larceny;

The State further arguing and contending that this last

statement which was testified to by the officers, was made at the request of defendant, himself; the State arguing and contending that this defendant became worried, that his conscience was bothering him, and that he decided to get it off his mind, and, thereupon, sent for the officers and made the statement as testified to by the officers some time after the warrant had actually been served upon him;

The State, therefore, arguing and contending, gentlemen of the jury, that this defendant on this evidence is guilty of rape and that you should return a verdict of guilty of rape as charged in the bill of indictment.

The defendant, on the other hand, argues and contends, that you should return a verdict of not guilty, the defendant arguing and contending that he has not had all the [fol. 193] advantages that some others have had; that he has not had the education that others have had, and that he was in a helpless position; that he was in jail; that he was kept in jail for a number of days without any charges being preferred against him; that he had no attorney or opportunity to confer with an attorney, and that he was held in jail from about the 19th day of June until about the 24th before any charges were actually placed against him; that during that time he was questioned and questioned at length by various officers, officers of experience and intelligence, and that due to his lack of education, due to his ignorance about matters of this kind that various statements were taken from him; that in many instances that his answers were suggested to him, and that these various statements were the results of long and skillful questioning and were taken from him because of the fact that he was not capable of defending himself against the accusations and claims of these various experienced officers who questioned him time after time during that period of time;

The defendant further arguing and contending that the officers could very easily be mistaken about some of the statements which they say this defendant has made; that various statements were made; that the officers have testified that various conflicting statements were made, and that it is as much your duty to consider one of those statements as it is your duty to consider another; that the defendant,

at all times, and in all statements, insisted that he only went to this radio shop for the purpose of stealing money therefrom; that he had taken money therefrom, the sum of about \$5.00, I believe, prior to that time; that he attempted to call Betty Jane Clifton or did call her on that occasion, attempting to get her across the street, in the shop across the street, and trying to delay her there at the telephone so he could slip into the radio shop and get what money he could find in her absence; the defendant arguing [fol. 194] and contending that had he had any idea or any notion or any plan to commit the crime of rape, that he would not have been trying to get her away from this shop, but, to the contrary, he would have been attempting to get her to remain at the shop; the defendant arguing and contending that he only went there, if he went there at all, for the purpose of getting some money; that his girl was planning a party for that night and that he was attempting to raise some money to help buy the refreshments for the party; that to corroborate that fact, that he had his radio with him that day; that he was attempting to get the radio repaired so it would be of some value at a pawn shop so that he could pawn it and raise some money on the radio; that, as a matter of fact, that he did later pawn the radio for the purpose of raising some money;

The defendant arguing and contending, therefore, he had no idea in his mind on this occasion except to try to get some money there from this radio shop; the defendant arguing and contending that he did that, that was the first act which he did after going into the shop, that he seized this pocketbook; that he then attempted to flee but that the girl obtained a rifle, and that his only motive in striking her at any time was to get away to get out, away from the place before he was detected in there; the defendant arguing and contending that his behavior on this occasion might have been foolish, but that he did not, at any time, attempt to rape or otherwise molest Betty Jane Clifton other than by the blow which he inflicted upon her;

The defendant arguing and contending that there are a number of discrepancies in the case about this matter of rape; that this defendant is not a rapist; that Mrs. Gross-

man, who the defendant argues and contends was a friend to Betty Jane Clifton and who was only some thirty feet away across the street when this matter occurred, immediately went to the scene, before any officers arrived; that she has no interest or no motive to protect this defendant, but, to the contrary, she is a friend of Betty Jane Clifton and would naturally be inclined to testify favorably to Betty Jane Clifton; the defendant arguing and contending that she was the first one there who actually noticed anything about the girl; that at that time she saw her; that she had an opportunity to see her, an opportunity to examine her; that she was working on her, trying to stop the flow of blood from the injuries to her head; that she saw her underclothing; that her underclothing was pulled up in its normal position, and that there was no blood on her underclothing at that time, the defendant, arguing and contending, had he raped this Betty Jane Clifton, as the State contends, that her clothes would have been torn or in disarray; that there would have been blood upon them, and that this would have been discovered by Mrs. Grossman when she was there immediately after it was discovered that Betty Jane had been injured; the defendant further arguing and contending that had Betty Jane Clifton been raped, as alleged by the State, that there would have been dirt, there would have been blood upon her panties or underwear and upon her skirt; the defendant arguing and contending that these articles of clothing were in the possession of Betty Jane Clifton and that they have not been exhibited to you gentlemen during the course of this trial; the defendant arguing and contending that had there been blood upon them, as testified by some of the witnesses, that they would have been introduced in evidence here for your inspection; the defendant further arguing and contending that had he been down on the floor in the act of raping or attempting to rape Betty Jane Clifton; that there would have been dirt upon the knees of the trousers, which were light colored and which have been exhibited to you; that some of the officers have testified that the place was dirty, greasy, that no fingerprints were [fol. 196] available because of that fact, and that certainly,



had this defendant been on the floor, that there would have been some markings to indicate that on the knees of his pants;

The defendant further arguing and contending that had this crime been committed, as the State alleges, that some fingerprints of this defendant would have been found on or about this scene, and that although a careful examination was made, that no such prints were found;

The defendant further arguing and contending, gentlemen of the jury, that this boy is a boy of good character; that his neighbors have so testified, and that the State has not sought to rebut that testimony; the defendant arguing and contending that a man of good character in his community would not have attempted to commit the crime as alleged by the State in this case;

The defendant further arguing and contending that under the law in this State that the burden of proof is upon the State to satisfy you, beyond a reasonable doubt, as to the guilt of this defendant; the defendant arguing and contending that due to these vital missing elements in this case, due to the discrepancies in the stories of the witnesses who have testified for the State, that there is enough to create in your mind a reasonable doubt about his guilt and that you should give him the benefit of that doubt and acquit him in this case; the defendant arguing and contending that, at the most, you should only find him guilty of an assault with a deadly weapon or with an assault on a female, he being a male person over 18;

The defendant, therefore, arguing and contending, gentlemen of the jury, that by your verdict you should not take the life of this defendant, but, at the most, that you should only find him guilty of a misdemeanor, that is, an assault, so that he might be punished for what he actually did on [fol. 197] that occasion rather than to be punished for some fanciful happenings which this defendant argues and contends did not happen, that is, the crime of rape, this defendant arguing and contending that he is not guilty of rape, that, at the most, he is only guilty of an assault on a female.

Gentlemen, those are some of the contentions of the parties. This case has been ably argued to you by attor-

neys for both the State and the defendant, and they have called to your attention other contentions which they deem appropriate to their position in the matter.

With respect to the charge of rape in the bill of indictment, the burden of proof rests upon the State to satisfy you, from the evidence, beyond a reasonable doubt, first, that the prisoner, Clyde Brown, had carnal knowledge of the prosecuting witness, Betty Jane Clifton; second, that he had such carnal knowledge without the consent or conscious permission of the said Betty Jane Clifton, and that he had such carnal knowledge by force or forcibly and against the will of the said Betty Jane Clifton. So your inquiry will be, therefore: Did the prisoner, Clyde Brown, have carnal knowledge, that is, an act of sexual intercourse—these two terms being synonymous—with the prosecuting witness? Did he have such carnal knowledge without the consent or conscious permission of Betty Jane Clifton? Did he have such carnal knowledge by force or forcibly and against the will of the said Betty Jane Clifton?—remembering what the Court has told you about the necessity, gentlemen, for a penetration by the male organ into the female organ to constitute this offense. You must find and find beyond a reasonable doubt, that there was a penetration, no particular depth of penetration being required, the slightest penetration being sufficient.

So I charge you, gentlemen, that if you find from the evidence and beyond a reasonable doubt that on the 16th day [fol. 198] of June 1950, the prisoner, Clyde Brown, had carnal knowledge of the prosecuting witness, Betty Jane Clifton, and that he had such carnal knowledge without the consent or conscious permission of the said Betty Jane Clifton, and that he had such carnal knowledge by force or forcibly and against the will of the said Betty Jane Clifton, then I charge you that the defendant would be guilty of rape, and if you so find, it will be your duty to render a verdict of guilty of rape against the defendant as charged in the bill of indictment. If you fail so to find, it will be your duty to render a verdict of not guilty; or, if upon a fair and impartial consideration of all the facts and circumstances in the case you have a reasonable doubt in

your mind as to the guilt of the defendant of the crime of rape, it will be your duty to give the prisoner the benefit of such doubt and acquit him on that charge—bearing in mind what the Court has told you, that if you should find this defendant guilty of rape, you may at the time of rendering your verdict in open court recommend life imprisonment.

If you find the defendant guilty of rape, you need not consider whether he is guilty or innocent of any of the lesser offenses which have been referred to and to which I have called your attention; but if you find him not guilty of the crime of rape, it will be your duty to consider and determine whether he is guilty of an assault with intent to commit rape on the said Betty Jane Clifton.

An assault, gentlemen, is an offer or attempt by force or violence to do injury to the person of another without striking him. A battery is the carrying of the threat into effect by the infliction of the blow, it being without the consent of the person on whom the offer of violence is made or who actually received the blow, the combination of the two being what the law denominates assault and battery. So an assault with intent to commit rape is an assault [fol. 199] made by a man upon a woman over the age of 12 years, with intent to gratify his passion or to have carnal knowledge of her, at all hazards, forcibly and against her will, and notwithstanding any resistance on her part. The burden of proof with reference to this charge in the bill of indictment rests upon the State to satisfy you from the evidence, beyond a reasonable doubt, first, that the prisoner, Clyde Brown, assaulted the prosecuting witness; second, that he assaulted her with intent to gratify his passion or to have carnal knowledge of her, at all hazards, forcibly and against her will and notwithstanding any resistance on her part.

So you will see that it is incumbent upon the State not only to satisfy you beyond a reasonable doubt that the prisoner assaulted the prosecuting witness, but that he assaulted her with intent to have carnal knowledge of her in the way and manner that I have already indicated.

Now, Gentlemen, the intent to commit a rape is the intent which exists in the mind of the man at the time he

committed the assault, to gratify his passion or to have carnal knowledge of her, at all hazards, forcibly and against her will and notwithstanding any resistance on her part. Intent is an act or emotion of the mind, seldom, if ever, capable of direct or positive proof, but it is arrived at by such just and reasonable deductions from the acts and facts proven as the guarded judgment of a reasonably prudent and cautious man would ordinarily draw therefrom. It is a mental act which may take place but remain confined in the mind which conceives it and never be susceptible of proof unless it is evidenced by the act, conduct or declarations of the party which betrays it, and it is usually shown only by acts and declarations and circumstances known to the party charged with the intent.

So I charge you, gentlemen, that if you find from the evidence and beyond a reasonable doubt that on the 16th [fol. 200] day of June 1950, the prisoner, Clyde Brown, assaulted the prosecuting witness, Betty Jane Clifton, she being a woman over the age of 12 years; that he committed said assault with intent to gratify his passion or to have carnal knowledge of the said prosecuting witness, at all hazards, forcibly and against her will and notwithstanding any resistance on her part, then I charge you that the prisoner would be guilty of an assault with intent to commit rape, and if you so find, beyond a reasonable doubt, it will be your duty to render a verdict of guilty against the prisoner for an assault with intent to commit rape, as charged in the bill of indictment. If you fail so to find, it will be your duty to render a verdict of not guilty as to that charge; or, if on a fair and impartial consideration of all the facts and circumstances you have a reasonable doubt in your mind as to the guilt of the defendant on that charge, you should give him the benefit of that doubt and acquit him as to that charge.

If you find the prisoner guilty of an assault with intent to commit rape, you need not consider whether he is guilty of an assault on a woman or an assault with a deadly weapon; but if you find him not guilty of an assault with intent to commit rape, then it will become your duty to determine and decide whether he is guilty of an assault



upon a woman, he being a man over the age of 18, or whether he be guilty of an assault with a deadly weapon.

I have already defined assault as being an offer or attempt by force or violence to do injury to the person of another. This is the generally approved definition of a simple assault. The essential difference between a simple assault committed upon the person of a man and the person of a woman is that the law provides a different punishment for an assault committed by a male person over the age of 18 years upon a woman.

[fol. 201] A deadly weapon, gentlemen, is not one that must kill, nor is it one that may kill. It does not depend upon the fact as to whether death ensues from the use of such weapon or not, but the size and nature of the weapon; the manner in which it is used, the size and strength of the party using it, and the person upon whom it is used—these must all be taken into consideration by the jury in determining whether it is a deadly weapon or not. A deadly weapon is one that would likely produce death or great bodily harm, used by the defendant in the manner in which it was used. In short, a deadly weapon is any instrument which is likely to produce death or great bodily harm, under the circumstances of its use, and where it may or may not be likely to produce such results, according to the manner of its use or the part of the body at which the blow is aimed, the alleged deadly character of the weapon is one of fact to be determined by the jury.

So I charge you that if you find from this evidence and beyond a reasonable doubt that on the 16th day of June 1950, the prisoner, Clyde Brown, committed an assault on Betty Jane Clifton with a deadly weapon, as I have defined those terms to you, then it will be your duty to render a verdict of guilty against the defendant for an assault with a deadly weapon. If you fail so to find, it will be your duty to render a verdict of not guilty on that charge, of, if on a fair and impartial consideration of all the facts and circumstances in the case you have a reasonable doubt in your mind as to the guilt of the defendant on that charge, then it will be your duty to give the defendant the benefit of that doubt and acquit him on that charge.

If you find the defendant guilty of an assault with a deadly weapon, you need not consider whether or not he is guilty of an assault on a woman, he being a male person over the age of 18; but if you find the defendant not guilty [fol. 202] of an assault with a deadly weapon, it will be your duty to consider whether or not he is guilty of an assault upon a woman, he being a male person over the age of 18 years of age and, in that connection, if you find from the evidence and beyond a reasonable doubt that on the 16th day of June 1950, the prisoner, Clyde Brown, committed an assault on the prosecuting witness, Betty Jane Clifton, as I have heretofore defined an assault to you, then it will be your duty to render a verdict of guilty against the defendant for an assault on a female, if you are satisfied beyond a reasonable doubt that the prisoner is over the age of 18 years. If you fail so to find, it will be your duty to render a verdict of not guilty as to that charge; or, if on a fair and impartial consideration of all the facts and circumstances you have a reasonable doubt in your mind as to his guilt on that charge, it will be your duty to give the defendant the benefit of that doubt and acquit him as to that charge.

Gentlemen, when you retire to make up your verdict you should appoint one member of your group as a foreman to render the verdict in open Court when you have arrived at such verdict.

Mr. Price, Mr. Solicitor, is there anything else you think I should state to the jury?

Mr. Price: No, sir, I think of nothing else.

The Solicitor: No, sir.

The Court: The thirteenth juror may now be excused. You may be discharged. You will have no further connection with the case. You other gentlemen may retire and make up your verdict.

(The jury retired at 5:32 o'clock P. M. At 6:58 o'clock P. M. the jury was called into the courtroom, and at that time stated they had not yet agreed; that it was their wish [fol. 203] to have their evening meal and continue their deliberations thereafter rather than continue their delibera-

tions the following day. Whereupon, the Court instructed the jury as follows):

The Court: Gentlemen, remember the caution I have given you each time while you are having a recess. Don't discuss the case; wait until you come back to your room to continue your deliberations. Don't talk to anyone about the matter. Sheriff, take them out and come back at 8:15. That will give you time to eat.

(At 8:18 o'clock P. M. the prisoner and the jury being present in the Courtroom, the following proceedings were had):

The Court: Gentlemen, you may retire and resume your deliberations.

(The jury thereupon retired to resume deliberations. At 8:55 o'clock P. M. the jury returned to the Courtroom, each juror's name was called and each juror answered to his name, and the verdict was taken as follows):

#### VERDICT

The Clerk: Gentlemen, have you all agreed?

Mr. D. C. Smith, Juror: We have.

The Clerk: Who shall speak for you?

(Mr. D. C. Smith raised his hand).

The Clerk: What is your name?

Mr. Smith: Smith, D. C. Smith.

The Clerk: Prisoner, stand up! Jurors, look upon the prisoner and harken to his cause. What say you for your verdict? Is he guilty of the rape and felony whereof he stands indicted, or not guilty?

[fol. 204] Mr. D. C. Smith: Guilty, as charged in the bill of indictment.

The Clerk: You find the defendant guilty. So say you all?

Mr. D. C. Smith: Yes. (The Jurors nodded their heads).

(Whereupon, at the direction of the Court, the jury was polled, each juror individually answering to his name and stating the verdict found is his own and that he still assents thereto).

The Court: Sheriff, remand the prisoner to jail. The Court will pass sentence tomorrow morning.

[fol. 205] (After convening of Court the following morning, and at approximately 9:50 A. M. the following proceedings were had, the prisoner being in the Courtroom):

The Solicitor: Your Honor, as Solicitor for the State, I, at this time, pray judgment in the case of State v. Clyde Brown.

The Court: Clyde Brown, stand up! It becomes my duty at this time to impose sentence in this case. Before doing so, do you have anything that you want to say, any statement that you want to make?

Mr. Price: Your Honor, may I make some statements?

The Court: Go ahead.

#### MOTION IN ARREST OF JUDGMENT, OVERHEARD

Mr. Price: If your Honor please, this, of course, is a motion in arrest of judgment. I want to call to your Honor's attention that at the close of the hearing on my motion to quash the bill of indictment I think there were certain facts found by the Court, among those facts, as I recall it, the Court found that the County Commissioners and those officers charged with the duty and responsibility of preparing the jury list prepared and used as the basis for the jury list the tax list, or something to that effect. In fact that was, I believe, the specific finding. I wanted to make this request of the Court, which is a predicate for the motion in arrest of judgment, and that is that the Court find the additional fact that the jury commissioners did not prepare and hand over to the Clerk of the County [fol. 206] Commissioners a list of other qualified citizens whose names do not appear on the tax list as required by General Statute 9, subsection 1. I will read that, if your Honor please. I think it is germane, and I don't think that the County Commissioners or the Sheriff or anyone has



any discretion in the matter; I think it is mandatory. "The Boards of County Commissioners for the several counties at their regular meeting on the first Monday in June, in the year 1905, and every two years thereafter, shall cause their clerks to lay before them the tax returns of the preceding year for their county, from which they shall proceed to select the names of all such persons as have paid all the taxes assessed against them for the preceding year." Now, let me stop right there, if your Honor please, and turn over to the amendment of 1947 and read what was added. This is Chapter 9, Subsection 1, reading as follows: "The Boards of County Commissioners for the several counties, at their regular meetings on the first Monday in June in the year of 1947, or the jury commissions or such other legally constituted body as may in the respective counties be charged by law with the duty of drawing names of persons for jury service, at the times of their regular meetings, and every two years thereafter, shall cause their clerks to lay before them the tax returns for the preceding year for their county, and a list of names of persons who do not appear upon the tax lists, who are residents of the county and over twenty-one years of age, from which lists the Board of County Commissioners or such jury commissions shall select the names of such persons who reside in the county who are of good moral character and have sufficient intelligence to serve as members of grand and petit juries."

Now, that was not done. It was admitted that it was not done by all of the witnesses who came to the stand: Mrs. Ayers and Mr. Click, I believe, who prepared the list from the tabulating machine in the tax office—they [fol. 207] all admitted that the list they used was the tax list. I am asking that your Honor find as a fact that they did not follow the law, or just find as a fact that they did not add to the list. I don't want to impose any burden on the Court unnecessarily, but since it is a fact, since it was admitted in open Court that they did not prepare this additional list from other citizens whose names do not appear on the tax list, I think it is imperative, if your Honor please, that that appear as a fact found by this Court, as a basis for any action that might be taken on

behalf of the defendant later on. So that formally, if your Honor please, I make the motion in arrest of judgment, which motion is predicated upon that special request to the Court, and ask that that go into the record.

The Court: Motion overruled.

To the ruling of the Court, the defendant, in apt time, excepts—Exception No. 25.

Mr. Price: All right. I also want to make a motion, if your Honor please, in arrest of judgment on the ground that the jury commissioners have violated the law. I think that I will just state it more or less in a blanket way, that the jury commissioners have violated the law in that they have discriminated against qualified citizens of Forsyth County in the preparation of the jury list, the jury list from which the grand jury was drawn that found the bill of indictment in this case.

The Court: Motion overruled.

To the ruling of the Court, the defendant, in apt time, excepts—Exception No. 26.

#### MOTION TO SET ASIDE VERDICT OVERRULED

Mr. Price: Then, of course, if your Honor please, I make the other formal motion for judgment as of nonsuit at the close of the case.

[fol. 208] The Court: To set the verdict aside. Motion overruled.

To the ruling of the Court, defendant, in apt time, excepts—Exception No. 27.

The Court: I think that the facts found on the preliminary motion are sufficient to present the question, because there is no evidence that any other list was used other than the tax list, and I find as a fact in that finding that the tax list was the basis for the jury list, so there couldn't be any misunderstanding about it.

Mr. Price: Well, the only thing about it—

The Court: If that section is mandatory, then the grand jury was improperly drawn. I grant you that.

Mr. Price: The only reason I request it is the case of State v. Speller, 229 NC 68. I think it is in point, and I believe that I might have a little trouble later on if that

fact is not found, because there was something said by the Supreme Court in that—

The Court: Well, I will review that finding, and if I don't think it is sufficient finding, I will make further finding: I want the question squarely presented.

Mr. Price: Very well.

#### JUDGMENT

The Court: Clyde Brown, stand up! Let everybody rise! Clyde Brown, you have been indicted, tried and convicted by a jury of your county of the rape of one Betty Jane Clifton without any recommendation of life imprisonment. The law prescribes, in General Statutes of North Carolina, Section 14-21, as amended, that the punishment for your crime is death. The Judgment of the Court, therefore, is that you be remanded to the common jail of Forsyth County and there remain until the adjournment of this Court.

[fols. 209-213] It is ordered that you be conveyed by the High Sheriff of said County of Forsyth to the Penitentiary of the State of North Carolina, and by him delivered to the Warden of said Penitentiary;

And it is further ordered and adjudged that you remain in the custody of said Warden until Friday, the 20th day of October 1950, and that on said day, between the hours of ten o'clock in the forenoon and three o'clock in the afternoon, that you be taken by the said Warden to the place of execution in said Penitentiary;

And it is adjudged that the said Warden then and there cause you to inhale lethal gas of sufficient quantity to cause death, and to continue the administration of such lethal gas until you are dead; and may God have mercy on your soul.

Sheriff, let the prisoner be remanded to jail. Remain standing, please.

(The prisoner was led from the Courtroom at 10:19 A. M.)

[fols. 214-216] [File endorsement omitted]

EXHIBIT 4 TO ANSWER—Filed July 5, 1951

IN SUPREME COURT OF NORTH CAROLINA

[Title omitted]

STIPULATION

It is stipulated and agreed that at least one negro in the person of Mrs. Mary Y. Matthews was drawn upon the Grand Jury for Forsyth County at the July 1950 Term of the Superior Court and that this negro woman was present and serving when the bill of indictment in the above styled case was returned by the Grand Jury at the September 1950 Term of the Superior Court for Forsyth County, and it is further stipulated and agreed that in the examination of the trial jury by counsel for the State and counsel for the defendant that at least one prospective negro juror was tendered to the defendant which juror was excused by counsel for the defendant.

This — day of November 1950.

Hosea V. Price, Counsel for Defendant. Walter E. Johnston, Jr., Solicitor.

[fol. 217] [File endorsement omitted]

EXHIBIT 5 TO ANSWER—Filed July 5, 1951

IN SUPREME COURT OF NORTH CAROLINA

[Title omitted]

DEFENDANT APPELLANT'S BRIEF

QUESTIONS TO BE DECIDED

1. Does GS 34, as amended, impose a mandatory duty upon the jury commission, or such other legally constituted body as may, under the law in Forsyth County, be charged with the duty of drawing names of persons for jury service,



to add to the tax list the names of other qualified residents of Forsyth County whose names do not appear upon the tax list, and thereafter select the names of the persons to serve as grand and petit juries?

2. Did the selection of the grand jury from a list of names prepared from names appearing on the tax returns alone and from which said list the names of other qualified citizens of Forsyth County, as required by the amended statute, GS 9-1, were purposely excluded, vitiate the indictment returned by said grand jury; and, hence, was the trial and conviction of the defendant pursuant to said indictment violative of the constitutional rights of the defendant?

[fol. 218] 3. Did the Court err in refusing to grant defendant's motion to quash the bill of indictment, which said motion was made by and upon special appearance of the defendant before pleading to said indictment because the grand jury by which said indictment was returned was unlawfully constituted?

4. Did the Court err in failing to sustain the defendant's objection to certain questions asked and answers elicited before the jury, as set out in defendant's Exceptions Nos. 18, 19 and 20 (R pp 135, 143 and 159)?

5. Did the Court commit error in finding as a fact and ruling that certain statements made by the defendant, under the circumstances of this case, were freely and voluntarily made, and, therefore, amounted to an admissible confession on the part of the defendant?

6. Did the Court err in permitting the Solicitor to introduce certain photographs over defendant's objection without first requiring the Solicitor to lay the proper foundation?

7. Did the Court commit error in refusing to grant defendant's motion of nonsuit or dismissal at the close of the State's evidence, and again at the close of all the evidence?

8. Did the Court commit error in allowing defendant's motion to set aside the verdict and motion in arrest of judgment?

#### Statement

This is a criminal action which was tried before his Honor Dan K. Moore, Regular Judge and a jury, at the September 4, 1950, Term of Superior Court in Forsyth County. Before pleading to the bill of indictment, the defendant, by special

appearance, made a motion to quash the bill of indictment on the grounds that the grand jury returning the indictment [fol. 219] was unlawfully constituted. The grand jury returning the indictment in this case was selected from a prepared list of names drawn only from the tax returns, and no other names were added to those found on the tax returns of persons who reside in Forsyth County who are of good moral character and have sufficient intelligence to serve as members of the grand and petit juries as required by the amended statute, N. C. G. S. 9-1. After finding certain facts the Court overruled the motion.

The defendant was thereafter tried under a bill of indictment charging the crime of rape. The verdict of guilty as charged in the bill of indictment was returned by the jury. From said verdict and judgment sentencing the defendant to death in the gas chamber, the defendant appeals to the Supreme Court.

#### Facts

The State adduced evidence at the trial to the effect that sometime around noon, or shortly before that time, on June 16, 1950, while Miss Bettie Jane Clifton was in her father's radio shop, the defendant entered the shop on the pretext of transacting some business, and while there he raped the said Bettie Jane Clifton, and thereafter beat the said Bettie Jane Clifton over the head with a 22 calibre rifle until she was unconscious. The State also adduced evidence to the effect that after an indefatigable investigation on the part of the Detective Bureau of the Police Department of Winston-Salem, the defendant, Clyde Brown, was arrested on Sunday after midnight, June 19, 1950. Evidence at the trial further discloses that the defendant was held without bail and without any formal charge being made against him until June 24, 1950, and that during this time (from the time he was arrested until June 24, 1950) he was questioned repeatedly, and that defendant was not given a preliminary hearing until July 7, 1950.

## Exceptions Nos. 1, 2 and 3:

These exceptions constitute defendant's Assignment of Error No. 1, and relate to the denial by the court of the defendant's motion to quash the bill of indictment against the defendant for the reason that the indictment was returned by a grand jury unlawfully impaneled, or stated otherwise, that the grand jury returning the indictment against the defendant was unlawfully constituted in that it was not drawn from a jury list prepared in accordance with G. S. 9-1 and amendments thereto. Prior to 1947 the statute (G. S. 9-1) pertaining to the selection of juries in North Carolina provided as follows:

"The board of county commissioners for the several counties at their regular meeting on the first Monday in June, in the year nineteen hundred and five, and every two years thereafter, shall cause their clerks to lay before them the tax returns of the preceding year for their county, from which they shall proceed to select the names of all such persons as have paid all the taxes assessed against them for the preceding year and are of good moral character and of sufficient intelligence. A list of the names thus selected shall be made out by the clerk of the board of commissioners and shall constitute the jury list and shall be preserved as such."

In 1947 the Legislature of North Carolina saw fit to amend this statute, and at the time the defendant went on trial in Forsyth County the statute providing for the making up of jury lists in North Carolina read, in part, as follows: (G. S. 9-1)

"The board of county commissioners for the several [fol. 221] counties at their regular meeting on the first Monday in June in the year 1947, or the jury commission, or such other legally constituted body as may in the respective counties be charged by law with the duty of drawing names of persons for jury service—shall cause their clerks to lay before them the tax returns

for the preceding year for their county, and a List of Persons Who Do Not Appear Upon the Tax List, who are residents of the county and over 21 years of age, from which list the board of county commissioners—shall select the names of such persons who reside in the county who are of good moral character and have sufficient intelligence to serve as members of the grand and petit juries. A list of the names thus selected by the board of county commissioners or such jury commission, shall be made out by the clerk of the board of county commissioners or such jury commission, and shall constitute the jury list of the county and shall be preserved as such.

The clerk of the board of county commissioners, or such jury commission, in making out the list of names to be laid before the board of county commissioners or such jury commission, may secure said lists from such sources of information as deemed reliable which will provide the names of persons of the county over 21 years of age residing within the county qualified for jury duty. There shall be excluded from said list all those persons who have been convicted of any crime involving moral turpitude or who have been adjudged to be non compos mentis."

The defendant contends and argues to this Court that the change in the statute by the 1947 Legislature imposed a mandatory duty on the jury commission of the several counties of the State of North Carolina, in making up jury lists from which grand and petit juries are to be drawn, to do more than refer only to the tax returns of the several [fol. 222] counties. On behalf of the defendant in this case it is argued and contended that the intendment of the 1947 amendment to G. S. 9-1 was to the effect that the jury commissions of the several counties of North Carolina were left with no discretion in the matter of preparing the jury lists from which grand and petit juries were to be drawn, except as reasonably may be inferred from the language of the statute and it is contended that it is not a reasonable inference to be drawn from said statute that the jury commissions may in their discretion omit the duty of adding to the tax returns a list of the names of persons who do not appear



upon the tax list who are residents of the county and over 21 years of age and who meet all the other requirements and qualifications prescribed by the statute.

Because of the lateness of this statutory change, this specific issue has not heretofore been presented to the Supreme Court of North Carolina for decision, so that a decision in this matter must basically rest on the legislative intent; and hence, the rules governing the general construction of the statutes and the obvious purpose of the statute, considering the evil that is sought to remedy, should, according to the contention and argument of the defendant, play an important role on the proscenium of the stage-setting for any consideration by this court of the question involved.

According to a long established and uncontroverted rule enunciated and laid down in a long line of decisions by this court, including such cases as *State v. Barco*, 150 NC 792; *Kearney v. Vann*, 154 NC 311; *Abernethy v. Board of Commissioners of Pitt County*, 169 NC 631; *State v. Earnhardt*, 170 NC 725; *State v. Burnett*, 173 NC 750; *Hunt v. Eure*, 188 NC 716, and *Norman v. Osborne*, 193 NC 791, the primary endeavor of the courts in construing statutes is to ascertain and give effect to legislative intent.

[fol. 223] In *Latham v. Latham*, 178 NC 12, the court stated: "A change in phraseology in dealing with the subject necessitates a presumption of a change in meaning."

Here the Legislature of North Carolina saw fit to change the statute affecting the making up of the jury lists, which for a long time had remained unchanged on the statute books of North Carolina. They changed the phraseology, changed the scope of its inclusiveness, and unequivocally intended to change the means or the method of compiling jury lists in the State of North Carolina.

If the jury commissions of the various counties of North Carolina, or such other legally constituted body, as may in the respective counties be charged by law with the duty of drawing names of persons for jury service, have the power to disregard this amendment to G. S. 9-1, as promulgated by the 1947 Legislature, then the work of the legislature as to this amendment is useless and is, therefore, rendered null and void.

To construe this statute as being merely directive or discretionary would be in contravention of a decision laid down

by this court in the case of *Manley v. Abernethy*, 167 NC 220, where the court said: "As between two possible constructions of a statute, that one should be adopted which effectuates rather than defeats the legislative purpose."

Hence, in considering G. S. 9-1, together with the 1947 amendment thereto, the legislative purpose was to make it possible for qualified unpropertied citizens to be given an opportunity to perform one of their democratic responsibilities and privileges by exercising jury duty.

The basic principle we have in mind is further enunciated in the following language of the Court in *McLeod v. [fol. 224] Board of Commissioners of the Town of Carthage*, 148 NC 77: "The law requires that, in the interpretation of a statute, we should give it that meaning which is clearly expressed; and if there is doubt or ambiguity we should construe it so as to ascertain from its language what was the true intention of the Legislature."

Is there anyone who would deny the wholesomeness of the above legislative purpose when it is to open up potential jury duty to all classes of citizens qualified and who meet the requirements of the law without regard to economic advantages of one class as against another class by reason of and evidenced by the one class owning real estate or being otherwise strategically situated so as to require members of that class to list for taxation? This Court indirectly asserted the same basic ruling when it declared in *Pittsburgh Life & Trust Co. v. Young*, 172 NC 470; a case involving statutory construction: "The statute could easily be evaded and nullified; and while this reason should not be considered, if the meaning is perfectly clear, so that there is no room for construction, it is a legitimate circumstance to be considered in ascertaining the meaning where construction is necessary."

Again, we urge and contend that to declare the 1947 amendment to N. C. G. S. 9-1 discretionary and merely directive would, unequivocally lay this act open to easy evasion and to all intents and purposes would render it null and void, or to say the least, would certainly render it voidable at the discretion of the county commissioners of the various counties, or such other legally constituted bodies as

may in the respective counties be charged by law with the duty of drawing names of persons for jury service.

In ascertaining the legislative intent, the wording of the statute is of primary consideration. This has been unambiguously and clearly stated in many North Carolina decisions. In *Alexander v. Johnson*, 171 NC 468, the court had this to say: "The legislative intent must be gathered from the language of the statute, a consideration of the existing law, the evils intended to be remedied, and the remedy applied."

The court had this to say further in *Blair v. Board of Commissioners of New Hanover County*, 187 NC 488: "The legislative intent as gathered from the statute itself prevails over all other consideration."

And again, in *Nance v. Southern Railway*, 149 NC 366: "We have no power of right to strike the words out, or to construe them away . . . . If the legislature has used language of clear import, the court should not indulge in speculation or conjecture for its meaning. In applying this rule the entire sentence, section or statute must be taken into consideration, and every word must be given its proper effect and weight."

We seriously contend and argue to this court that it is only sound judgment and common sense, and certainly not in the contemplation of any sound judicial system, to adopt a contrary position; and for the Legislature to pass an act and to have its compliance construed to be dependent on the whims, desire, feelings and emotions of those to whom the act was directed, is an absurdity, and thwarts the intention of the Legislature and tends to perpetuate the evil sought to be remedied.

While there is no need for any judicial statutory construction in this case, we think it wise to superficially examine what means of construction would be incumbent upon the Court if such a construction were necessary. In construing statutes there are certain prescribed steps which are taken by the courts. First, the one that has already been examined, i. e., legislative intent; secondly, the courts go to the wording of the statute and try to ascertain its meaning [fol. 226] from the language used therein.

In the case of *Mfg. Co. v. Turnage*, 183 NC 137, the court held: "The object of all interpretation or construction is

to ascertain the meaning and intention of the Legislature, to the end that the same may be enforced which must be sought for first of all in the language of the statute itself; for it must be presumed that the means employed by the Legislature to express its will are adequate to the purpose and do express the legislative will correctly."

In *Nance v. R. R.*, 149 NC 366, at pages 370 and 371, the court said: "... The object of judicial interpretation is to determine the legislative intent, and to this end words should generally be given their popular meaning if they have not acquired a meaning which is technical. It is only when the terms of the statute are ambiguous or of doubtful construction that the court may exercise the power of controlling the language in order to give effect to what they suppose to have been the real intention of the lawmakers. If the language is not ambiguous and the intent is plain, there is no reason for resorting to external circumstances as an aid to interpretation for in such case there is really no grounds for construction. We must, therefore, ascertain the intention of the General Assembly from the language of the acts."

There are many other cases in which this basic rule has been affirmed: *Board of Commissioners of Vance County v. Town of Henderson*, 163 NC 114; *Peoples Bank v. Loren*, 172 NC 666; *Whitford v. North State Life Ins. Co.*, 163 NC 223; *State v. Barco*, 150 NC 792.

The basic premise laid down in the above cited and quoted case is that unless there is ambiguity in the language of a statute the courts have no interpretive rights and are bound by the general and usual meaning of the words used in the statute under question.

[fol. 227]... The pivotal word in this statute (G. S. 91 as amended) is "SHALL." What is the meaning of shall when it is used in the manner employed in this statute?

According to Black's Law Dictionary, Third Edition, we find this definition: "As used in statutes, contracts, this word 'SHALL' is generally imperative or mandatory." Webster's Collegiate Dictionary, Fifth Edition, the accepted and recognized authority of American English, gives us this definition: "Shall," when used in the second or third person, is expressive of some authority or compulsion on the speaker's part, as in 'thou shalt not kill'."



Our Blessed Saviour, Jesus Christ, saw fit to prescribe certain commandments which every human being desirous of everlasting life must keep. In stating these commandments He said throughout "Thou shalt not." The etymology of shall is shalt and, of course, thou has reference to the second person "you." Is there anyone naive enough to contend that "shalt" as used in the Ten Commandments is merely directive or that it leaves a discretion on the part of humanity in its observance of those Ten Commandments?

The appellant, therefore, argues and contends that the same imperativeness inherent in the word shalt in the Ten Commandments is as obviously present in G. S. 9-1 as amended in 1947, in the instance where the Legislature used the term shall in prescribing the method and rules for making up and preparing jury lists.

The wording of G. S. 9-1 prior to the 1947 amendment was: "The board of county commissioners . . . SHALL cause their clerks to lay before them the tax returns for the preceding year for their county, from which they SHALL proceed to select the names of all such persons as have paid all the taxes assessed against them for the preceding year, and [fol. 228] are good character and of sufficient intelligence."

It is not reasonable to presume that the statute prior to the 1947 amendment gave the county commission any discretion in having the tax list laid before them as the basis for the jury list. If it was in the discretion of the county commission to have or not to have the tax list laid before them for compiling the jury list, then the county commissioners could have invariably hand-picked the jurors in every county in the State of North Carolina. It is not logical to conclude that the statute prior to its 1947 amendment was mandatory, and then conclude that the amendment to the statute was discretionary. In both the body of the statute and the amendment the word SHALL was used. It seems perfectly reasonable, plausible and logical that had the Legislature intended for the amendment to be discretionary, they would have deviated from the wording that had been held as mandatory through the years and used such a word as MAY, which is indicative of discretion. The defendant, therefore, contends and argues that the amendment to G. S. 9-1 gave a mandate to the county commissioners as strong,

as clear, and as unequivocal as the mandate given such county commissioners in the statute of 1905.

As mentioned heretofore, we contend that there is no room for judicial construction of the statute because the intent of the Legislature is clear, and the general unambiguous language of the statute must be given its clear import according to the usual meaning of the words used therein. It is quite clear that the 1947 General Assembly of North Carolina imposed a duty upon jury commissions as to the manner in which jury lists are to be made up, which was mandatory. To conclude otherwise is in utter contravention of the general rules of statutory construction and is repugnant to the legislative intent.

[fol. 229] In this case the evidence is uncontradicted on the point that no outside names of qualified citizens were added to the tax list. His Honor, Dan K. Moore, Judge presiding, found this as a fact (R p 50). The defendant, therefore, argues and contends that the grand jury which returned a true bill of indictment and the petit jury which brought in the verdict were improperly and unlawfully drawn and impaneled, and that their improper and illegal status rendered the acts of both null and void. The appellant further contends that because of the above mentioned law and facts the trial court erred in denying the defendant's motion to quash the bill of indictment. The fact that the jury commission of Forsyth County, in preparing the master potential jury list, confined itself to the tax list, and failed to add to this list the names of other qualified citizens of Forsyth County, as required by G. S. 9-1, as amended, infinitely prejudiced the constitutional rights of the defendant, Clyde Brown. The appellant is a young man of very limited education, is not a property owner, and because of circumstances beyond his control, he lacks many of the advantages afforded most American youth. He occupies an economic status and is a part of a group or class of citizens which is not very well recognized in the social, political and governmental stream of life in this country. (R pp 192-193).

Apparently, the General Assembly took cognizance of this lack of recognition of the under-privileged portion of our citizenry in 1947, and made an attempt to alleviate this dialectical and dangerous practice. But the efforts of the

General Assembly were stripped of all hopes of fruition by the failure on the part of the jury commission of Forsyth County to abide the mandates of G. S. 9-1 in the matter of preparing and making up the jury lists from which the grand and petit juries concerned with the indictment and trial of the appellant were drawn. And as a result of this [fol. 230] total disregard for the legislative act, GS 9-1, as amended, the defendant has been prejudiced in his constitutional rights.

The basic concept of the jury system is that a man be tried by twelve others of his peer. The word "peer" means one of the same rank, quality, or of an equal match. Is the property the equal match of the unpropertied? Can a man who has never known the pangs of hunger and who has never worried about having the necessities of life, or who has been throughout his life well-fed, well-clothed and well-housed, judge understandingly a man who has through his entire life known the excruciating pangs of hunger, has been in constant fear of being unable to enjoy the bare necessities of life, shielded from the elements only by the four walls of a squalid hut, and, in short, enduring the most meager offerings of life?

To understand the emotional and mental attitude in a situation such as the one under consideration here, one needs to know or to have known similar circumstances and conditions. While perhaps there is little or no homology between Victor Hugo's main character, Jean Valjean in "Les Miserables," at the same time we think that it is more or less germane or timely to refer to the sociological aspect of that noted piece of literature to point out the fact that one never having the need to steal or rob cannot understand properly the psychological motive of the robber.

We, therefore, strongly contend that the appellant was denied the possible understanding attitude of citizens of Forsyth County of his same economic strata, by reason of the fact that all such persons were excluded from the list made up and prepared by the jury commission from which the grand and petit juries in the instant case were drawn.

The appellant also was prejudiced in another way by the failure of the Forsyth County jury commission to comply [fol. 231] with GS 9-1, as amended. In the Record (p. 23) is found a statistical report on the Forsyth County census.

In this report the Court will find the figures of poll tax listers for 1950. We find that there are 20,120 white and 2,987 Negroes. Bear in mind that these figures refer to poll tax listers. The ratio of poll tax listers, therefore, is almost ten to one, while the racial population ratio is about two to one. (R. p. 23) From these figures one readily sees how the jurors racially will almost invariably be disproportionate. Regardless of the fact that this might be the result of apathy or lethargy, it is the contention of the appellant that he should not be denied the possibility of pro rata racial representation on the jury, especially since the Legislature of North Carolina has seen fit to clearly, unequivocally and expressly give him that right by directing the jury commissions to use tax lists only as a basis or starting point in compiling jury lists and to add to that list all other qualified citizens in the county. See also *Cassell v. Texas*, 94 L. ed. 563.

## II

### Exception No. 17 (R. p. 133):

The appellant argues and contends that the Court erred in finding as a fact and ruling that the statements made by the defendant were freely and voluntarily given and that the defendant was in nowise physically mistreated, threatened or otherwise coerced. (R. p. 133) The defendant was arrested around 12:00 or 12:30 o'clock A.M. on June 19, according to the testimony of Detective Reid. (R. p. 96) The defendant was questioned repeatedly by Detectives Reid, Carter and others until he finally made a statement which was by the Court ruled to be a voluntary statement or confession. And no special effort was made to connect the defendant with counsel before he was subjected to repeated questioning. (R. pp. 98, 99 and 100). The defendant was [fol. 232] not charged formally until June 24, 1950, and was not given a preliminary hearing until July 7, 1950.

While we expressly refrain from charging against the Police Department of Winston-Salem any of the now famous shocking examples of police abuse, such as was the foundation and motivating factor behind such decisions as *McNair v. United States*, 318 U.S. 332; *Ashcraft v. Tennessee*, 322 U.S. 143, and *Anderson v. United States*, 318 U.S.



350, we strongly urge for the consideration of this Court that the defendant was coerced by the Police Department and that there was other conduct on the part of the Police Department of Winston-Salem which so influenced the will of the defendant that his confession was wholly involuntary and should not have been allowed as competent evidence in the trial of the defendant. (R. p. 117)

We also call the Court's attention to the Record (p. 110) with regard to the repeated examination of the defendant before he made a statement, and further invite the Court's attention to the fact that according to the Record (p. 110) the defendant was not fully advised as to his rights before he made a statement. Of course, the evidence is conflicting on this point, but we ask that the Court take into consideration the lack of intelligence on the part of the defendant as will certainly be revealed from a careful perusal of the whole record. We believe, therefore, and certainly argue the point that this case is almost on all-fours with the case of *Turner v. Pennsylvania*, 338 U.S. 6267, 93 L. ed. 1810. We ask the Court's indulgence while we briefly review the facts in the *Turner* case:

"For six months the Philadelphia police had been investigating the felonious death of one Frank Andres. At 10:30 in the morning on June 3, 1946, they arrested Aaron Turner, the petitioner, on suspicion of homicide and took him to the office of the Homicide Division at the City Hall. [fol. 233] The officers making the arrest had no warrant and did not tell the petitioner why he was being arrested. These officers began to question the petitioner as soon as they reached the City Hall Police Station. One of them examined the petitioner for three hours on that afternoon and again that night from 8:00 to 11:00 o'clock. From time to time other officers joined in the interrogation.

"... On June 7, the day when a confession was finally obtained, questioning began in the afternoon and continued for three hours. Later that day the officers who had been present during the afternoon returned with others to resume the examination of the petitioner. Despite the fact that he was falsely told that other suspects had 'opened up' on him, petitioner repeatedly denied his guilt, but finally, at about 11:00, petitioner stated that he had killed the

person for whose murder he was later arraigned. At 9:00 o'clock the following morning the same police officers started to reduce his statement to writing, interrupted this process to bring him for a preliminary hearing before a Magistrate in the same building, and returned to the transcript of his statement which was completed by about noon.

"At the trial, petitioner objected to the introduction of his statement on the grounds that it was the product of police conduct of a nature condemned by our previous cases.

"The jury returned a verdict of guilty and recommended the death penalty. In deciding this case, the Court said: 'Putting this case beside the consideration set forth in our opinion in *Watts v. Indiana*, 338 U. S. 49, leaves open no other possible conclusion than that petitioner's confession was obtained under circumstances which made its use at the trial a denial of due process. We must, accordingly, reverse the judgment and remand the case.' "

[fol. 234]

### III

#### Due Process of Law—Geographical Pattern of Enforcement

It is well settled in law that the term "*due process of law*" is not susceptible of exact or comprehensive definition. Its meaning has been developed in the cases by a process of judicial inclusion and exclusion. (See headnote, Vol. 16, *Corpus Juris Secundum*, page 566, Sec. 567).

Generally speaking, the purpose of the guarantee is to prevent governmental encroachment against life, liberty and property of individuals . . . and to secure to all persons *equal and impartial* justice. *Plott Co. v. Ferguson Company*, 163 S. E. 688; 202 N. C. 446.

In all seriousness, and yet with respectful submissiveness, appellant raises the question and wonders if there does not exist some kind of mysterious geographical pattern of enforcement among whose tenacles he has found himself inextricably fastened. Is not the failure on the part of the jury commission of Forsyth County to comply strictly with the law in the matter of selecting the grand and petit jury an integral part of this pattern? Can it be said that appellant has been the recipient of impartial justice and has been given the full benefit of the general law which is secured by laws operating on all alike? Praying that he will not appear

supercilious, appellant argues and contends that there is a pattern of enforcement, which, because of his racial identity, deprived him of equal protection of the law. It will, no doubt, be regarded by this court as being improper, or to say the least, not germane, but we earnestly ask the indulgence of the court that consideration be given to the editorial appearing in the Durham Morning Herald, on Thursday, October 5, 1950, which serves to answer the question in affirmative as to the existence of some kind of pattern of enforcement: [fol. 235] "A young Negro, charged with raping a white girl, received a fair trial in a North Carolina city the other day and he was sentenced to die in the gas chamber at Raleigh."

"A newspaper there congratulated the people of the town for the fact that the trial had proceeded without incident and with no attempt at violence against the Negro."

"One wonders if the South is such a land of violence that a fair trial for a Negro is unusual and that the absence of violence against him is a fit subject for editorial congratulations. This newspaper does not believe it."

"The case, however, does offer a subject for editorial comment—when taken with another case that was being tried at about the same time."

"In the second case, tried in another North Carolina town, a white man was charged with the same offense against a Negro woman. He was also charged with a second, lesser offense against her."

"The evidence against him on both counts apparently was as strong as that upon which the Negro was convicted. In addition to this, he had a bad record."

"This man, however, was allowed to plead guilty to the lesser offense and escaped with a prison sentence."

"Would he have had the same treatment if he had been a Negro and his victim a white woman? Would the Negro who was convicted of the crime against the white girl have had the same treatment if he had been a white man and she had been a Negro?"

"These two cases cause one to wonder if justice is so indifferent to the color of a man's skin after all."

[fols. 236-237] Respectfully submitted, Hosea V. Price, Harold T. Epps, Attorneys for the Defendant, 13 East Third Street, Winston-Salem, N. C.

[fol. 238]

[File endorsement omitted]

EXHIBIT 6 TO ANSWER—Filed July 5, 1951

IN SUPREME COURT OF NORTH CAROLINA

[Title omitted]

## BRIEF FOR THE STATE

## Statement

This is a criminal action tried before his Honor Dan K. Moore, Judge, and a jury, at the September 1950 Term of the Forsyth County Superior Court. The defendant, Clyde Brown, was charged in the bill of indictment with the rape of Betty Jane Clifton. (R. p. 8) The jury returned a verdict (R. p. 15) of guilty as charged in the bill of indictment, and from judgment pronounced upon the verdict, the defendant appealed to the Supreme Court of North Carolina.

## Facts

On June 16, 1950, the defendant, Clyde Brown, a Negro man, went into the radio shop of Thomas E. Clifton on West Seventh Street, in Winston-Salem, and raped his daughter, Betty Jane Clifton, a high school girl in the eleventh grade. The victim of this assault, Betty Jane Clifton, was cruelly beaten and maltreated in a fiendish manner and was taken to the hospital where she remained unconscious and hovered [fol. 239] between life and death for many days. (See R. pp. 93, 60, 61, 62. See evidence of Dr. Dale on R. p. 70. See evidence of nurse Nancy Strader on R. p. 179). The defendant beat the victim, Betty Jane Clifton, with a rifle and perhaps other weapons, and there was no doubt but what she was raped because blood flowed from her private parts and soiled her underclothes, and doctors testified that penetration had been accomplished. (See evidence of Dr. Harry W. Goswick on R. p. 60 and Dr. F. P. Dale on R. p. 70). The victim, Betty Jane Clifton, remembered very little about what happened as will be seen from her evidence beginning on Record p. 78.

The defendant, Clyde Brown, was seen in the vicinity of the radio shop close to the happening of this event as will



be seen by the evidence beginning on Record p. 82. The defendant was arrested and held for some time for investigation. He told various stories of his whereabouts and persons he had seen and talked with, which were investigated patiently by the police officers of Winston-Salem and were found to be untrue. He finally sent for the officers of his own accord and admitted that he went into the radio shop and assaulted, beat and raped Betty Jane Clifton. As is customary in a case of this kind, the police officers gave evidence on the question of the competency of the defendant's confession, and the police officers likewise testified before the jury after the confession had been ruled upon, and the Judge found that the same should be submitted to the jury, all according to the practice that prevails in this State. For the various stories that the defendant told, as well as his confession, we refer the Court to the evidence of the officers beginning on R. p. 135 and extending continuously through R. p. 166.

The defendant, during this time, told the police officers where to find the clothes which he had worn on this occasion (R. p. 42); and he also told the officers where to find the billfold that belonged to the victim, Betty Jane Clifton, [fol. 240] and the officers went and found the billfold hidden in the place as related by the defendant: (R. p. 147)

### Argument

#### *The Defendant's Motion to Quash the Bill of Indictment*

The defendant filed a motion to quash the bill of indictment, which will be found on Record p. 22. We submit that this motion to quash is not sufficient to meet the standard of even criminal pleadings which are very liberal in this State. Everything alleged in the motion to quash is in the nature of a conclusion; no facts are alleged to support the conclusions. The defendant simply says that the Grand Jury was selected in an unconstitutional manner in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States. The only definite thing he says in this motion to quash is that the Grand Jury was selected "with a view to and purpose in mind of systematically limiting representation thereon of Negroes or persons of African descent." The Court will see that

this is still a conclusion as the facts are not alleged, which, according to the contention of the defendant, constitute this limitation of persons of African descent. Even a motion to quash must follow some elementary rules governing pleadings.

Shreve v. U. S., 77 Fed. (2d) 2;  
 Colbeck v. U. S., 10 Fed. (2d) 401;  
 Whitman v. State, 122 So. 567 (Fla.);  
 State v. Ellington, 96 So. 529 (La.).

It is the holding in many jurisdictions that the grounds upon which the motion to quash is based must be set forth in some detail in the motion.

Boyd v. State, 143 N. E. 355 (Ind.);  
 People v. Damazoni, 223 P. 1003 (Okl.);  
 State v. Skinner, 230 P. 537 (Wyo.);  
 [fol. 241] State v. DeBoard, 194 S. E. 349 (W. Va.);  
 Ingham v. State, 172 N. E. 401 (Ohio);  
 Deibert v. State, 133 A. 847 (Md.).

We submit, therefore, that the defendant cannot merely say that the Constitution was violated and that the number of people of African descent were limited in their jury service and thereby proceed to offer any kind of proof that he desires. The Court will see that the defendant does not one time contend in this motion that G. S. 9-1 (Cumulative Supplement of 1949) is unconstitutional and invalid. The defendant gently drifts all through this whole trial and never once, even by means of a whisper, intimates that he contends that G. S. 9-1, as to the selection of a jury and making up the list, is invalid. The defendant even grows suspicious of his own tactics. He even feels himself that he has not said enough about the matter because on Record p. 205, after the case had been tried and the defendant found guilty, counsel for the defendant then, for the first time, begins to argue what proves to be now his concept of the real point in the case; that is, should G. S. 9-1 be construed as mandatory or directory. He now brings this before the Court on what he says is a motion in arrest of judgment. (See R. pp. 205, 206, 207).

We do not understand from the defendant's brief that he attacks G. S. 9-1 as being invalid on its face or as being

inherently unconstitutional, but if we understand his position correctly, he contends that the commissioners did not follow the provisions of the statute and that this resulted in an unlawful selection of the jury and in limiting the number of colored persons that could possibly be in the jury box.

*Our Present Jury Selection Statute is to be Construed as Directory insofar as the Amendment of 1947 is Concerned.*

[fol. 242] The defendant spends considerable time in his brief on the question as to whether it is mandatory or directory for the commissioners, when they are preparing the jury list, to have laid before them, in addition to the tax returns for the preceding year, a "list of persons who do not appear upon the tax list, who are residents of the county and over twenty-one years of age." The defendant says that the evidence on the motion to quash all shows that in making up the jury list, the commissioners used only a list of persons who appeared upon the tax list for the preceding year. We think the defendant's reasoning on this statute is not correct.

Previous to the amendment of 1947, all jurors were obtained from the tax list, and, in addition, such persons had to be of good moral character and of sufficient intelligence. Qualifications for jurors have been held to be constitutional and valid.

*Strawder v. West Virginia*, 100 U. S. 303, 35 L. Ed. 664.

*Faye v. New York*, 322 U. S. 261, 91 L. Ed. 2043

In the Faye case above cited, it was held to be constitutional and not a violation of the due process clause or a denial of the equal protection clause to establish Blue Ribbon juries in the State of New York.

It is quite apparent that what the amendment of 1947 did was merely to enlarge the sources of information from which the names of persons could be obtained who were eligible to serve as jurors. It is also clear that the county commissioners are not required to obtain names from all

sources and from all possible lists because in the second paragraph of the statute, we find the following:

"The clerk of the board of county commissioners, or such jury commission, in making out the list of names to be laid before the board of county commissioners or such jury commission, *may secure said list from* [fol. 243] such sources of information as deemed reliable which will provide the names of persons of the county over twenty-one years of age residing within the county qualified for jury duty." (Emphasis added).

A reading of this excerpt shows that the commissioners can select the source of names which is by them considered reliable. The statute simply empowered the commissioners, if they desired to do so, to use other sources than the tax list which is the fundamental and basic source of names for jury duty.

It is to be noted that the statute, prior to 1947, required the commissioners to purge the jury box every two years on the first Monday in June, and in all of these requirements, the word "shall" is used. In spite of all this mandatory language, if the commissioners fail to meet and purge the box as required or in the case of many other irregularities, this jury statute has always been held by our courts to be construed in a directory fashion. There is no reason to think that the method of construction of the statute has been changed simply because it was amended to include other sources of information if the commissioners wished to consult these sources.

State v. Smarr, 121 N. C. 669;

State v. Perry, 122 N. C. 1018;

State v. Dixon, 131 N. C. 808;

State v. Banner, 149 N. C. 519;

State v. Fertilizer Co., 111 N. C. 658;

State v. Mallard, 184 N. C. 667.

In State v. Smarr, supra, the Court said:

"Nor was there any force in the objection that the jury list was not revised (owing to delay in receiving the laws of 1897) on the first Monday in June, but at



the meeting of the commissioners on the first Monday in July or August. It does not appear that the prisoner was in anywise prejudiced thereby, and such requirements as to the manner or time of drawing jurors have always been held directory in the absence of proof of bad faith or corruption on the part of the officers charged with that duty. *S. v. Stanton*, 118 N. C. 1132; *S. v. Fertilizer Co.*, 111 N. C. 658; *S. v. Wilcox*, 104 N. C. 847; *S. v. Hensley*, 94 N. C. 1021; *S. v. Griffice*, 74 N. C. 316; *S. v. Haywood*, 73 N. C. 437."

The whole matter is summed up in the case of *State v. Mallard*, supra, from which we quote extensively as follows:

"It seems to have been quite definitely decided by the court, in several cases, that the irregular action of the board of county commissioners, where there is no fraud or corruption, and no opportunity for fraud, on the part of the person interested, in drawing a jury not in strict accordance with the statute, does not invalidate the array.

"In *S. v. Martin*, 82 N. C. 672, the commissioners refused to put on the list of jurors names which were drawn because they thought too many were drawn from one section of the county, and, wishing to equalize the number among the different townships, they were put back in the box and others drawn in their stead. More was done, and of a more serious character, than was done here. The Court refused to allow the challenge of defendant's counsel to the array in that case. It appears to us that what the commissioners did in *S. v. Martin*, supra, departed further from the letter of the law and its substance or spirit than what was done by the commissioners of Brunswick in this particular case. There the commissioners, after drawing the scrolls, and knowing the names thereon, refused to put them on the jury list of their own accord. Here, however, the names already separated, or segregated, according to townships, were drawn by a child under ten years of age from a hat after they had been mixed up indiscriminately, and only that number [fol. 245] drawn and put on the list to which the township, as the commissioners verily believed, was entitled.

according to its proportion of population. There could, therefore, be no opportunity or chance for fraud. The general effect of the act of the commissioners was to distribute the jurors to each of the townships throughout the county.

"In *Moore v. Guano Co.*, 130 N. C. 229, Stanley, one of the commissioners, objected to a number of names in Shallotte Township, and those names were discarded and returned to box No. 1. Sheriff Walker also objected to several from Town Creek Township. When the name of Monroe Hickman was drawn, some one said, 'He is right there among the rest,' meaning that he was drawn from the same community, or neighborhood, as others whose names had been drawn. Commissioner Stanley, however, replied, 'I want him,' and his name was placed on the list. Stanley's own son was selected, he, the father, having stated that his son was so anxious to come to Southport that he had better be taken. The challenge to the array was allowed in that case.

"In *Boyer v. Teague*, 106 N. C. 576, the defendant Teague was sheriff of the county and a party to the particular action. There was no actual or intentional fraud, but the challenge to the array was allowed because the commissioners permitted Teague to participate in the drawing. In each of these cases, though, there was no actual fraud established by proof, yet the action of the commissioners was such as to open the door to fraud, and for that reason the challenge to the array was allowed, and properly so, as the personnel of the jury was made to depend, to some extent, at least, upon the will, or conduct, of an interested party.

"*S. v. Perry (Hatton)*, 122 N. C. 1018, was to this effect: 'It has always been held that the regulations [fol. 246] in The Code, Secs. 1722 and 1728 (now C. S. 2312 to 2319 inclusive) are directory only to the board of county commissioners, and while they should be observed, the failure to do so did not vitiate the venire in the absence of bad faith or corruption on the part of the county commissioners.' All of the previous cases seem to have been cited in that case.

"In *S. v. Dixon*, 131 N. C. 808, it appears that, at the time of the revision of the tax list in June 1901, the commissioners added no new names to the jury list, but had purged the box by taking out the names of those who had not paid their taxes. This, though an irregularity, was held by the court not to be sufficient ground for challenge to the array, citing *S. v. Perry*, supra, and other decisions, and then proceeded: 'These cases are not overruled in *Moore v. Guano Co.*, 130 N. C. 229, which merely holds that the conduct of the county commissioners in that case went beyond mere irregularity, and involved a matter so serious in its nature as to invalidate the panel drawn in such a manner.'

"In *S. v. Daniels*, 134 N. C. 641, the court again reaffirms the principles set forth in the older cases. There the county commissioners failed to make the prepayment of taxes a qualification for persons on the jury list. Again the court in that case distinguishes *Moore v. Guano Co.*, supra.

"In *S. v. Teachey*, 138 N. C. 587, the board of commissioners revised the jury list at a time not fixed by the statute, and included in it names of persons otherwise qualified, but which did not appear upon the tax list. It was held that this was a sound objection to the panel.

"In *S. v. Banner*, 149 N. C. at page 521, the objection was that three years had elapsed without a revision of the jury list by the board of commissioners. It was held [Vol. 247] that this did not avoid the panel. There was a challenge to the array in *Lanier v. Greenville*, 174 N. C. 311, and the challenge was overruled, though the irregularities in that case were apparently much greater than they are in this. The subject is referred to again in *S. v. Wood*, 175 N. C. 819.

"It is admitted by the State in this case that the defendant is entitled to have the bill of indictment found by a grand jury; the individual members of which are legally qualified to act as grand jurors. *S. v. Baldwin*, 80 N. C. 390; *S. v. Smith*, *ibid.* 410; *S. v. Watson*, 86 N. C. 624; *S. v. Sharp*, 110 N. C. 604; *S. v. Paramore*, 146 N. C. 604. In this instance, however, there is not the slightest attack upon the competency of any indi-

vidual upon the grand jury to serve as a grand juror. It is admitted, and so found by the court, that there was no fraud or collusion in the selection of this particular grand jury. There was a mere irregularity, which in itself was intended to promote justice and to prevent fraud and collusion. In every case cited above, from *S. v. Seaborn*, 15 N. C. 305, to *S. v. Perry*, supra, such irregularities have been held not a ground of challenge to the array, the statute being directory in those matters not concerning the essence of the jury's constitution.

The authorities as decided by the appellate courts of other jurisdictions are to the same effect.

*Welch v. State*, 183 So. 879 (Ala.);  
*People v. Tenant*, 83 P. (2d) 937, 940 (Cal.);  
*State v. Simmons*, 198 A. 294 (N. J.);  
*Crickmore v. State*, 12 N. C. (2d) 206, 213 (Ind.);  
*People v. King*, 85 P. (2d) 928 (Cal.);  
*Davis v. State*, 187 So. 783 (Fla.);  
*People v. McDrea*, 6 N. W. (2d) 489 (Mich.);  
*W. E. Roche Fruit Co. v. Northern Pacific Ry. Co.*,  
 139 P. (2d) 714, 716 (Wash.);  
*Midkiff v. State*, 243 P. 601 (Ariz.).

[fol. 248] In *Midkiff v. State*, supra, the Court said:

"The defendant on this question seems to be imbued with the idea that a literal compliance with paragraph 3522, supra, is essential, or else his constitutional and statutory rights have been denied him. A moment's reflection is enough to show how absurd such a contention is. Paragraphs 3515 and 3516, Civil Code, make all male citizens of the United States, free from certain disabilities therein enumerated, who have resided in the county at least 6 months, eligible to jury duty. It is an absolute impossibility to include in the list of jurors for any given year the names of all persons within the county qualified and liable to serve as such under the present law. The legislature has not empowered the board of supervisors, or anyone else, to take a census of such persons at the beginning of the year or at any



subsequent time during the year, and if, as defendant contends, all persons qualified and liable to serve as jurors must be listed as such, and the jury trying him taken therefrom, and that he cannot lawfully be tried by a jury otherwise constituted, then we have a situation created by the Legislature in which it is impossible to lawfully try a person charged with crime.

"We take it that the provisions of the statute empowering and directing the board of supervisors to make a jury list and to place thereon all persons qualified and liable to jury service in the county is directory and not mandatory. 35 C. J. 268, Section 225. Such, in effect, was the holding of this court in *Lawrence v. State*, 240 P. 863, for therein we held 'that a literal fulfillment of the statute is (not) required.' The list is required to contain such a large number of persons, not for the benefit of the accused so much as to distribute the burdens of jury duty over the whole citizenship. As was said by the Iowa court, passing upon a somewhat [Vol. 249] similar question in *State v. Wilson*, 144 N. W. 47, 50, 166 Iowa 309, 316:

"It is very plain that, in exacting the large lists from which to draw grand and petit jurors, the purpose was not to protect any right of defendant or other litigants. Qualified jurors might readily have been drawn from a fraction of the number listed. The primary object is to distribute the burden of serving on the jury equitably among the inhabitants of the county. *State v. Massey*, 2 Hill (S. C.) 379; *Sumrall v. State*, 29 Miss. 202. In the last case, after stating the facts, the court said: 'If, therefore, the name of any person already returned be omitted in the annual list, . . . or if the assessor should wholly fail to return an annual list as required by law, it will not vitiate the list of jurors, provided they are regularly drawn from the box No. 1; because the persons so drawn have been legally returned and enrolled as competent jurors, and it is no objection to their competency that other persons who should have been added to the list, in order that they might bear their part of the burden of such service, have not been regularly returned. The question is:

Have those persons who have been duly drawn from the box as jurors been duly returned and entered as persons liable to such duty? And, if this be answered in the affirmative, it would be absurd to say that they were illegal jurors, except so far as the individuals should be found deficient in the legal qualifications, to be tried by the court when they should be impaneled as a jury. If this view were not correct, the greatest inconvenience and confusion might frequently occur by the errors or delinquency of the returning officers, and the administration of justice be delayed or defeated by a narrow and literal interpretation of the statute in violation of its true spirit and intent. It would be to apply a regulation which was merely intended to subject all persons in the county liable as jurors to the performance [fol. 250] of that duty, and thus equalize the burden among the people, in such a manner as to render illegal persons duly returned, drawn, and impaneled, and thereby to embarrass and defeat the very system intended to be established. The defendant has not the right to be tried before any particular jury. All that he can demand is that his triers be legally qualified and be chosen from those designated in the manner prescribed by law to perform that service." " "

In *W. E. Roche Fruit Company v. Northern Pacific Ry. Co.*, 139 P. (2d) 714, 716, the Court said:

"Rem. Rev. Stat. Sec. 96, governs the matter under discussion. We quote the pertinent parts thereof:

" . . . The county assessor in each county shall prepare annually a list of all persons qualified and subject to serve as jurors, giving the name, age, sex, whether naturalized or native-born citizen, occupation, jury district and postoffice address of such persons, and shall certify and file a copy thereof with the county clerk on or before the first day of June of each year. During the month of July of each year the judge or judges of the superior court for each county shall select from said list and other sources and enter in a book kept for that purpose and shall certify and file with the county clerk a jury list containing the names of a sufficient number

of qualified persons of fit character and intelligence to serve as jurors until the first day of August of the next calendar year. . . .

*In making the selection the judge or judges shall not be bound by the list of names filed with the county clerk by the assessor, but may select qualified persons not included in the list. At any time and from time to time the judges may revise the jury list by striking therefrom or adding thereto, and [fol. 251] when this is done a certified list of names stricken or added shall be filed with the clerk. . . .*

Any woman who upon being listed by the county assessor shall claim her exemption to serve as a juror, shall not be listed in the preparation of the list of jurors. . . . (Italics ours.)

"Counsel insist, and rightly, that a litigant is entitled to have his case submitted to a jury selected in the manner required by law; and further that, if the selection is not made substantially in the manner required by law, an error may be claimed without showing prejudice, which will be presumed. But it will only be presumed when there has been a *material* departure from the statute.

"We have examined some sixteen or seventeen decisions cited by appellant from other jurisdiction, and, in considering the differences in the statutes and circumstances involved, we do not find the principles therein announced so varianced from our own that we feel inclined to recede from the position taken in *State v. Rhoder*, 82 Wash. 618, 620, 144 P. 914, 915, from which we quote as follows: 'The manner of making up the jury lists indicated by the statute is merely directory, and need be only substantially complied with to the end that a fair and impartial trial may be had. There are decisions to the effect that statutes describing the powers and duties of the jury commissioners and corresponding officers, to whom is intrusted the duty of making up the jury lists and prescribing the time and manner of exercising such duties, are mandatory. But in this state we have followed the great weight of authority, to the effect that such statutes are directory, and that the very fact that the officer in the

performance of his duty failed to conform precisely to the statutory requirements did not invalidate his act, unless it appears that there is reasonable apprehension that the complaining party has been prejudiced. The [fol. 252] purpose of all these statutes is to provide a fair and impartial jury, and if that end has been attained and the litigant has had the benefit of such a jury, it ought not to be held that the whole proceeding must be annulled because of some slight irregularity that has had no effect upon the purpose to be effected. There is no attempt to show any prejudice here, but the whole attack is based upon the act of the clerk in making use of the information obtained from sources other than the tax scrolls and pollbooks, it being said that such information is not from "official sources" as demanded by the statute. All we care to say, and all that need be said, is that the clerk has substantially complied with the duty imposed upon him by the statute, and such compliance is sufficient, in the absence of any showing of consequent injury. *State v. Krug*, 12 Wash. 288, 41 P. 126; *State v. Bokiën*, 14 Wash. 403, 44 P. 889; *State v. Straub*, 16 Wash. 111, 47 P. 228; *State v. Barnes*, 54 Wash. 493, 103 P. 792, 23 L. R. A. (N. S.) 932; *State v. LeRoy*, 61 Wash. 405, 112 P. 635."

#### The True Intention or Reason for the Amendment of 1947 Expanding the Sources of Information in the Jury Statute Was for the Purpose of Placing Women on the Jury

It is contended by us that after the case of *State v. Emery*, 224 N. C. 581, wherein it was decided that women were not eligible to serve on the juries, the Constitution of the State was amended so as to allow women to serve on juries. Inasmuch as the names of women eligible for jury duty did not appear in any great numbers on the tax list, it was necessary to allow the county commissioners other sources of information to obtain the names of women to serve on juries. Apparently this Court agrees with this contention because [fol. 253] in the case of *State v. Litteral*, 227 N. C. 527, 531, the defendant raised the point that no women served on the



jury by which he was convicted. In disposing of this contention, this Court said:

"Likewise the contention that the absence of women on the jury panel constitutes a fatal defect in the proceeding is without merit. The constitutional amendment adopted in 1946 merely makes women eligible for jury service. Before it becomes of practical application its needs must be implemented by legislation prescribing qualifications and manner of selection of women for jury service. *See Chap. 1007, Session Laws, 1947.*" (Emphasis supplied.)

The Board of County Commissioners, in Their Administration of the Jury Selection Statutes, Have Not Violated Any of the Constitutional Rights of the Defendant

The defendant, in his last attack, contends that the jury selection authorities have administered the statute in an unconstitutional manner. He shows the total population of both white and colored by the Census of 1940 and 1950, and the poll tax listings for the year of 1950; but it will be noted that no figures are shown for the total tax listings, and the jury list was made up by the commissioners from the total tax listings. It will further be seen from the evidence of Howard W. Floyd, the Courtroom Clerk, that one Negro woman, Mrs. Mary Y. Matthews, served on the Grand Jury that found the bill against the defendant. (See R. pp. 38 and 39). This present Grand Jury was drawn at the meeting of June, 1950, when sixty names were drawn from which the Grand Jury was taken which found this bill. (R. p. 45). It will also be seen from the evidence of Nat S. Crews, the County Attorney, that he attended all of the meetings and [fol. 254] that there had been no discrimination between white and colored people in the selection of the jury. On Record p. 46 will be found the public-local act under which the jury is drawn in Forsyth County. It will be seen that the Grand Jury of Forsyth County is drawn on the 25th day of December and the 25th day of June of each year so that the Grand Jury serves for a term of six months. The Court will also see from the evidence of Howard W. Floyd, beginning on Record p. 38, that several members of the colored race were drawn on the jury, and on Record p. 42 he

testifies that he has yet to see a jury in the box in the courtroom in Forsyth County when there was not at least one member of the Negro race on the jury. On Record p. 24 it is agreed in a stipulation between counsel that out of the thirty-seven regular jurors called, there were at least eight members of the Negro race and that out of the special veniremen called, at least three were members of the Negro race. When we bear in mind also that there was one Negro woman who served on the Grand Jury that found the bill of indictment against the defendant, it is hard to see that there has been any jury discrimination against the eligible colored jurors.

It further appears from the evidence of John Click, who is the I. B. M. Supervisor in the office of the Tax Supervisor of Forsyth County, that he furnished the Register of Deeds office a list of all people eligible for jury duty according to the tax records. This list is compiled by the I. B. M. machine by running the cards through the machine, and a list is thus tabulated with all of the names and addresses. Juveniles are excluded and non-residents, as well as deceased persons. This list is tabulated every two years. These cards are not separated as to white taxpayers and colored taxpayers, but there is a code number on the card which allows colored taxpayers to be separated from white taxpayers if desired. The county commissioners, however, do not follow the code, and only people who are familiar [fol. 255] with the I. B. M. procedure would know what the code number indicated. There is no evidence whatsoever that any distinction was made in the drawing of the jury, and this is shown not only by the defendant's own witnesses but also by the State's evidence which begins on Record page 40. All of the witnesses who had anything to do with the jury list testified that there had been no exclusion of anyone because of race, and the defendant did not place upon the witness stand a single person of the colored race who was eligible to serve on the jury but who had never been called for jury duty.

The fact that in this case there was a code designation on the I. B. M. cards and on the list which separated the colored and white persons does not show discrimination.

State v. Walls, 211 N. C. 487 (Certiorari denied in 302 U. S. 635, 82 L. Ed. 494).

State v. Middleton, 36 S. E. (2d) 472 (S. C.);

U. S. v. Dennis, 183 Fed. (2d) 201 (Ad. Op. No. 3).

In the case of *U. S. v. Dennis*, *supra*, which is the famous trial of the Communists in New York, Mr. L. Hand, Circuit Judge, writing the opinion of the Court for the Second Circuit, on this point, said:

"Nothing need be added, regarding the asserted discrimination against Negroes. So far as they were not represented on the list in proportion to their numbers, there is no evidence that it was on account of their race; and the disproportion is adequately explained by the fact that they are among the poorer groups. The argument drawn from the presence of the letter 'C' on their cards is without basis; it is understandable why the clerks should wish to know how many Negroes were on the list. The very fact that the Supreme Court had several times decided that they must be represented was occasion enough; any clerk would wish to avoid any color of a charge that he had discriminated against [fol. 256] them. Had the list been drawn up for this particular prosecution, there might be some plausibility in finding a motive for keeping down the possibilities of Negroes on the jury, so great have been the wrongs done that race; but only a jaundiced mind can suppose that a public official in New York, having no personal stake in the event, would hazard the risk of detection for the sake of venting his bias against the race generally."

We must call attention again to the fact that the defendant has not shown that any colored persons were available for jury duty that had not served or that had been excluded. As we will show later on, the burden was on the defendant to make this showing, and the defendant has not shown the long-continued exclusion, the purposeful, intentional, arbitrary exclusion of eligible representatives of the Negro race which warrants the inference or *prima facie* case requiring proof and rebuttal on the part of the State. For example, in the case of *Norris v. Alabama*, 294 U. S. 597, 79 L. Ed. 1074, the defendant placed upon the witness stand many

members of the Negro race who were eligible for jury service but who had never served on the jury during their lifetime.

It is not denied that under the Fourteenth Amendment, the eligible citizens of defendant's race are entitled to their chance to serve on the various juries and cannot be deprived of this chance by design. But fairness in selection does not require a guaranteed, proportional representation of the defendant's race on every jury selected and constituted.

Cassell v. Texas, — U. S. —, 94 L. Ed. 563 (Ad. Op. No. 13);

Akins v. Texas, 325 U. S. 398, 89 L. Ed. 1692;

Thomas v. Texas, 212 U. S. 278, 53 L. Ed. 512;

Virginia v. Rives, 100 U. S. 313, 25 L. Ed. 667;

Swain v. State, 215 Ind. 259, 18 N. E. 2d 921, 926;

Zimmerman v. State, — Md. —, 59 A. (2d) 675 (Cert. [fol. 257] denied, 93 L. Ed. (Ad. Op. No. 7) 425);

16 C. J. S. (Constitutional Law), Sec. 540.

The type of discrimination condemned is said to be "purposeful discrimination" (Akins v. Texas, 325 U. S. 398, 89 L. Ed. 1692), or a "long-continued, unvarying, and wholesale exclusion of Negroes from jury service" (Norris v. Alabama, 294 U. S. 587, 79 L. Ed. 1074). There is a presumption that officers in charge of jury selection have performed their duty fairly and justly (Tarrace v. Florida, 188 U. S. 519, 47 L. Ed. 572, 116 So. 470 (Fla.), Certiorari denied in 278 U. S. 599, 73 L. Ed. 525) and without discrimination against race or class. The burden of proof is upon defendant to show an alleged discrimination in the selection of a grand or petit jury (Akins v. Texas, 325 U. S. 398, 89 L. Ed. 1692; Murray v. Louisiana, 163 U. S. 101, 41 L. Ed. 87).

In Akins v. Texas, 325 U. S. 398, 89 L. Ed. 1692, the Court uses the words "purposeful discrimination." In Norris v. Alabama, 294 U. S. 587, 79 L. Ed. 1074, the Court uses the words "long-continued, unvarying, and wholesale exclusion of Negroes from jury service."

It is very generally held that the burden of proof is on the



defendant or defendants to show an alleged discrimination in the selection of a grand or petit jury.

Akins v. Texas, 325 U. S. 398, 89 L. Ed. 1692;

Murray v. Louisiana, 163 U. S. 101, 41 L. Ed. 87.

There is a presumption that officers in charge of the selection and summoning of a jury or jury panel will be presumed to have performed their duty fairly and justly without discrimination against any race or class. In other words, discrimination in the selection of a jury will not be presumed.

Tarrance v. Florida, 188 U. S. 519, 47 L. Ed. 572, 116 So. 470 (Fla.). (Certiorari denied in 278 U. S. 599, 73 L. Ed. 525).

[fol. 258] Fairness in selection has never been held to require proportional representation of races upon a jury.

Akins v. Texas, 325 U. S. 398, 89 L. Ed. 1692;

Virginia v. Rives, 100 U. S. 313, 25 L. Ed. 667;

Thomas v. Texas, 212 U. S. 278, 53 L. Ed. 512.

A defendant has no constitutional right to be indicted or tried by any particular jury or by a jury composed in part of members of his race or class.

State v. Peoples, 131 N. C. 764, 42 S. E. 814;

State v. Sloan, 97 N. C. 499;

State v. Logan, 341 Mo. 1164, 111 S. W. (2d) 110 (1937);

Martin v. Texas, 200 U. S. 316, 50 L. Ed. 494.

"It is unsafe, we think, to attach too much significance to abstract, mathematical ratios or to the so-called law of recurrences in determining whether there has been arbitrary discrimination in the selection of the juries."

Swain v. State, 215 Ind. 259, 18 N. E. (2d) 921, 926.

The State contends, therefore, that the defendant has not met the burden imposed upon them and as required by

the principles stated in the case of *Faye v. New York*, 322 U. S. 261, 91 L. Ed. 2043, where this Court said:

"It is fundamental in questioning the composition of a jury that a mere showing that a class was not represented in a particular jury is not enough; there must be a clear showing that its absence was caused by discrimination, and in nearly all cases it has been shown to have persisted over many years. *Virginia v. Rives*, 100 U. S. 313, 322, 323, 25 L. Ed. 667, 670, 671; *Martin v. Texas*, 200 U. S. 316, 320, 321, 50 L. Ed. 497, 498, 499, 26 S. Ct. 338; *Thomas v. Texas*, 212 U. S. 278, 282, 53 L. Ed. 512, 513; 29 S. Ct. 393; *Smith v. Texas*, 311 U. S. 128, 85 L. Ed. 84, 61 S. Ct. 164; *Hill v. Texas*, 316 U. S. 400, 86 L. Ed. 1559, 62 S. Ct. 1159; *Akins v. Texas*, [fol. 259] 325 U. S. 398, 89 L. Ed. 1692, 65 S. Ct. 1276, *supra*. Also, when discrimination of an unconstitutional kind is alleged, the burden of proving it purposeful and intentional is on the defendant, *Tarrance v. Florida*, 188 U. S. 519, 47 L. Ed. 572, 23 S. Ct. 402; *Martin v. Texas*, 200 U. S. 316, 50 L. Ed. 497, 26 S. Ct. 338; *Norris v. Alabama*, 294 U. S. 587, 79 L. Ed. 1074, 55 S. Ct. 579; *Snowden v. Hughes*, 321 U. S. 1, 8, 9, 88 L. Ed. 497, 502, 503, 64 S. Ct. 397; *Akins v. Texas*, 325 U. S. 398, 400, 89 L. Ed. 1692, 1694, 65 S. Ct. 1276."

Under the North Carolina practice, the questions raised by the defendant's motion to quash are in the first instance heard and decided by the trial Court. The trial Court makes findings of fact; and in the absence of an abuse of discretion or in the absence of lack of evidence to support findings, such decision of the trial Court is ordinarily binding upon the Supreme Court. This practice is illustrated by the following cases:

- State v. Speller*, 229 N. C. 67, 47 S. E. 2d 537;
- State v. Kirksey*, 227 N. C. 445, 42 S. E. 2d 613;
- State v. Lord*, 225 N. C. 354, 34 S. E. 103;
- State v. Henderson*, 216 N. C. 99, 3 S. E. 2d 57;
- State v. Bell*, 212 N. C. 20, 192 S. E. 852;
- State v. Walls*, 211 N. C. 487 (Certiorari denied 302 U. S. 635, 58 S. Ct. 18, 82 L. Ed. 494) 191 S. E. 232;
- State v. Cooper*, 205 N. C. 657, 172 S. E. 199;

State v. Peoples, 131 N. C. 784, 42 S. E. 814;  
 State v. Daniels, 134 U. S. 641, 46 S. E. 743.

While it is recognized by the State that on a question of this kind, the findings of the trial Court are not final; nevertheless, great weight is to be accorded the trial Court's decision because such Court makes the initial investigation and has a greater opportunity to investigate the facts.

- \* Thomas v. Texas, 22 U. S. 278, 53 L. Ed. 512;
- Akins v. Texas, 325 U. S. 398, 89 L. Ed. 1692.

In Thomas v. Texas, *supra*, the Supreme Court of the United States said:

[fol. 260] "As before remarked, whether such discrimination was practiced in this case was a question of fact, and the determination of that question adversely to plaintiff in error by the trial court and by the court of criminal appeals was decisive, so far as this court is concerned, unless it could be held that these decisions constitute such abuse as amounted to an infraction of the Federal Constitution, which cannot be presumed, and which there is no reason to hold on the record before us. On the contrary, the careful opinion of the court of criminal appeals, setting forth the evidence, justifies the conclusion of that court that the Negro race was not intentionally or otherwise discriminated against in the selection of the grand and petit jurors. Indeed, there was a Negro juror on the grand jury which indicted plaintiff in error, and there were Negroes on the venire from which the jury which tried the case was drawn, although it happened that none of them were drawn out of the jury box."

In Akins v. Texas, *supra*, the Supreme Court of the United States said:

"As will presently appear, the transcript of the evidence presents certain inconsistencies and conflicts of testimony in regard to limiting the number of Negroes on the grand jury. Therefore, the trier of fact who heard the witness in full and observed their demeanor on the stand has a better opportunity than a reviewing

court to reach a correct conclusion as to the existence of that type of discrimination. While our duty, in reviewing a conviction upon a complaint that the procedure through which it was obtained violates due process and equal protection under the Fourteenth Amendment, calls for our examination of evidence to determine for ourselves whether a Federal constitutional right has been denied, expressly or in substance [fol. 261] and effect, Norris v. Alabama, 294 U. S. 587, 589, 590, 79 L. Ed. 1074, 1076, 1077, 55 S. Ct. 579; Smith v. Texas, 311 U. S. 123, 130, 85 L. Ed. 84, 86, 61 S. Ct. 164, we accord in that examination great respect to the conclusion of the state judiciary, Pierre v. Louisiana, 306 U. S. 354, 358, 83 L. Ed. 757, 760, 59 S. Ct. 536. That respect leads us to accept the conclusion of the trier on disputed issues 'unless it is so lacking in support in the evidence that to give it effect would work that fundamental unfairness which is at war with due process.' "

The State contends, therefore, that this jury list was carefully selected and made up at the proper time in June 1949, from a list of taxpayers, both poll taxpayers and ad valorem taxpayers and that it is clear, both from the defendant's witnesses on the motion to quash, as well as the State's witnesses, that no discrimination was practiced. It is clear that Negroes have been serving on the juries in Forsyth County, and in fact, the defendant has never asserted that there has been arbitrary, purposeful, systematic exclusion of Negroes. He merely says their number has been limited because they have been drawn from the list of eligible taxpayers. Prior to 1947, this was the only list that could be used, and yet there have been cases on jury discrimination in the Supreme Court of the United States from North Carolina, and, in fact, from Forsyth County, and no one has ever attacked the jury statutes of this State as being unconstitutional on their face even when the selection was limited to the tax list; and, as we have shown, the States can constitutionally set up eligibility conditions for jurors.



## The Defendant Cannot Avail Himself of the Question of Jury Discrimination on a Motion in Arrest of Judgment

We have heretofore called the attention of the Court [fol. 262] to the fact that the defendant made a motion in arrest of judgment wherein he, for the first time (R. p. 205), let the Court know that he contended that the statute, G. S. 9-1, had not been complied with by the county commissioners. All of this, therefore, is a matter of jury discrimination and jury selection, and under the practice in this State cannot be attacked by a motion in arrest of judgment. If the defendant claims discrimination in jury selection or any defect in jury selection, such matters are outside of the record and must be shown by motion to quash. In such matters, therefore, the defendant must rely on his motion to quash, and this motion to quash does not even mention the statute. That the defendant cannot raise Grand Jury selection questions on a motion in arrest of judgment, see *State v. Linney*, 212 N. C. 739.

A motion in arrest of judgment, of course, is only available for defects which appear on the face of the record. The statute does not appear on the face of the record, and this motion is, therefore, unavailable to the defendant, and he must rely on his motion to quash.

*State v. Brown*, 218 N. C. 415;

*State v. McCoilum*, 216 N. C. 737;

*State v. Linney*, 212 N. C. 739.

## Exceptions Not Argued in Defendant's Brief.

The defendant in his statement of the questions involved refers to certain exceptions dealing with the evidence. These are stated in question form as Nos. 4 and 6 in his statement of questions set forth in his brief. We cannot find that the defendant has anywhere advanced any argument in his brief in support of these exceptions or that he has cited any authority in support of same, and, therefore, under the rulings of this Court, these exceptions are deemed to be abandoned.

[fol. 263] *State v. Stallings*, 230 N. C. 252;

*State v. Reid*, 230 N. C. 561;

*State v. Frye*, 229 N. C. 581.

## The Defendant's Constitutional Rights Were Not Violated by the Admission of His Confession in Evidence

### Exception No. 17 (R. p. 133):

The defendant was arrested and detained for several days before he was formally charged with this offense. He was questioned several times, and all of these occasions, with the length of time he was questioned, are set forth in the record. He was warned of his rights on each occasion and was advised that he could have counsel. There is not the slightest evidence of any brutality or that the defendant was ill-treated in any manner whatsoever. He was given cigarettes when he asked for them and was given all of his meals. On some occasions, his girl friend, Mattie Mitchell, was present, and at least on one or two occasions, his mother was present. He was never questioned inside the jail but was brought outside the jail, and upon his request, the conversation was stopped at any time. On each occasion, the officers talked with him in the offices of the Detective Division. These offices are on the second floor of the City Hall and are entirely open to the public. See evidence of W. F. Reid, police officer, on Record page 95. See also evidence of Captain W. R. Burke on Record page 127.

### Evidence of Clyde Brown

The defendant, Clyde Brown, was a witness in his own behalf on the subject of the admissibility of his confession. [fol. 264] His evidence begins on Record page 107, and we wish to comment especially on his evidence.

On Record page 109, he specifically admits that the officers told him that he could have the benefit of counsel on two occasions. He tries to repudiate this later on in his testimony. (See R. p. 112). On Record page 114, he admits that his girl friend, Mattie Mitchell, told him that he had told an untruth about the way he was dressed and when he left her house, and he agreed in her presence that he had told an untruth. If the court will read his whole testimony as the same appears in the record, it will find that he himself admits that he did everything that the State asserted against him except the actual rape.

On Record page 116, he admits that he was fed his meals at the regular hours, and he admits that no one hit him or abused him in any way. On Record page 118, he admits that he was given cigarettes and that everything was done to make him comfortable. On Record page 119, he admits that he told the officers that he went in the radio shop to rob the girl and that he took her pocketbook, but that he did not rape her.

On Record page 120, he admits that he was not threatened or mistreated in any way and that he was warned of his rights. He also states that he was warned that anything he said would be used against him. On Record page 121, he admits that he called the Grossman's Record Shop from the City Market for the purpose of getting Betty Jane Clifton away from the radio shop and that in the telephone conversation, he pretended to be a woman, inquiring about a radio; and on Record page 122, he admits that he went into the radio shop after that conversation. Beginning at the bottom of page 122 of the Record and continuing over on page 123, the Court examined the defendant, and he told the Court that he was never mistreated by the officers in any manner; that no violence was used or threatened to be used against him; that nobody hit him or threatened to hit him; that nobody offered him any reward and that nobody told him that he would get out lighter if he made a statement. He admits that he was told that he did not have to make a statement and that he was warned at least once before he made his final statement and that at that time he was told that any statement which he might make would be used against him.

As a matter of fact, when he made his last statement, when he admitted the rape of the prosecuting witness, he sent for the officers himself. He partially admits all of this on Record page 124. On Record page 125, he admits that he told the officers where the pocketbook or billfold of Betty Jane Clifton was concealed, and on Record page 126, he admits that he never at any time asked for an attorney.

The Court went fully into all of these matters, and on Record page 133, the Court found as a fact that the confession was given freely and voluntarily and was, therefore,

competent. On Record page 134, the trial continues in the presence of the jury.

The ruling of the Court was amply supported by the evidence, and under the decisions of this State, this ruling cannot be disturbed upon appeal.

State v. Brown, 231 N. C. 152, 56 S. E. 2d 441;  
 State v. Little, 227 N. C. 527, 43 S. E. 2d 84;  
 State v. Hammond, 229 N. C. 108, 47 S. E. 2d 704;  
 State v. Thompson, 227 N. C. 19, 40 S. E. 2d 620;  
 State v. Wagstaff, 219 N. C. 15, 12 S. E. 2d 657;  
 State v. Fain, 216 N. C. 157, 4 S. E. 2d 319;  
 State v. Godwin, 216 N. C. 49, 3 S. E. 2d 347;  
 State v. Grass, 223 N. C. 31, 25 S. E. 2d 193.

[fol. 266] The Admission of Defendant's Confession is Not in Violation of the Fourteenth Amendment of the Constitution of the United States.

In his brief, the defendant admits that he does not charge the Police Department of the City of Winston-Salem with any shocking examples of police abuse as contained and set forth in certain cases decided by the Supreme Court of the United States, but he contends that the conduct of the Police Department was of such nature that the defendant was coerced, and the confession was involuntary. He then tries to bring this case within the purview of the ruling in *Turner v. Pennsylvania*, 338 U. S. 62, 67, 93 L. Ed. 1810.

Our Statute, G. S. 15-41, provides when a defendant can be arrested without a warrant. It is also provided by G. S. 15-46 the procedure to be followed when an arrest is made without a warrant. It is provided by G. S. 15-47 that the arrested person is to be informed of the charge against him, bail is to be allowed except in capital cases, and the defendant is to be allowed to communicate with counsel or friends.

In this case, the defendant was repeatedly told that he could have counsel; he was told that the charge against him was the assault and rape of Betty Jane Clifton; he was allowed to see his friends, and there is nothing in this record that brings this case within the purview and scope of any of the cases decided by the Supreme Court of the



United States, and this we will demonstrate later on in this brief.

As to the defendant's detention, he was being held for a capital offense, and in this connection, the case of *State v. Exum*, 213 N. C. 16, is in point. In this case, the facts disclosed that the defendant was imprisoned in jail in another county. The defendant was asked to make a confession and did so upon the condition that he be taken [fol. 267] to his home to confer with relatives. While on the trip in the car with the officers, the defendant confessed the crime. The defendant at the trial contended that G. S. 15-47 had been violated and that he had been illegally detained. In disposing of this contention, the Court said:

"The evidence at the trial shows that immediately after his arrest, the defendant was informed by the sheriff that he was charged with the murder of James Williams. This is a capital case. For this reason the provisions of the statute with respect to bail are not applicable to this case.

"There is no evidence in the record tending to show that after his arrest and while he was in the custody of the sheriff the defendant demanded of the sheriff that he be permitted to communicate with friends or with counsel. For this reason the provisions of the statute with respect to the right of a defendant in the custody of an officer and charged with the commission of a crime, to communicate with friends and counsel are not applicable to this case.

"Conceding, however, that the sheriff had violated the provisions of the statute, in the instant case, it would not follow that a voluntary confession made by the defendant to the sheriff would be inadmissible as evidence because of such violation. It is not so provided in the statute."

The mere detention and questioning of a suspect is not prohibited either at common law or under the due process clause.

*Lyons v. Oklahoma*, 322 U. S. 596, 88 L. Ed. 1481;  
*Lisenba v. California*, 314 U. S. 219, 239-241, 86 L. Ed. 166, 181, 182.

Even if it should be considered that the detention of the defendant was illegal, this does not necessarily become decisive on the question of the voluntariness of defendant's [fol. 268] confessions; and if it should be decided that defendant's detention was contrary to law, this does not, of itself, decide the issue in defendant's favor.

*Lisenba v. California*, 314 U. S. 219, 86 L. Ed. 166, 179.

All of the cases cited and relied upon by defendant either show long continued questioning in relays by officers, brutal treatment, threats or combinations of these factors, plus illegal detention. We wish to briefly comment on the important cases dealing with confessions:

*Hailey v. Ohio*, 332 U. S. 596, 92 L. Ed. 224: The petitioner, a boy 15 years old, was questioned for five hours by police in relays by one or two each. He was shown an alleged confession of his co-defendants. A lawyer tried to see him twice but was refused admission by police. His mother testified that his clothes were torn and bloodstained.

*Malinski v. New York*, 324 U. S. 401, 89 L. Ed. 1029: Malinski was not allowed to see his attorney although he asked for him. Malinski was held in a hotel from 8 o'clock A.M. to 6 o'clock P. M. then held in a hotel for that night and for the next three days. He was questioned at various times and made various confessions. There is no comparison in the facts in the Malinski case and in the present case.

*Ashcraft v. Tennessee*, 322 U. S. 143, 88 L. Ed. 1192: The petitioner was subjected to a 36 hour period of practically continuous questioning, seated under powerful electric lights. This questioning was done by relays of officers and experienced investigators. There is no comparison in this case to the facts now before the Court.

*Lyons v. Oklahoma*, 322 U. S. 596, 88 L. Ed. 1481: Here the petitioner had made a confession which was admittedly [fol. 269] involuntary and illegal. He afterwards made another confession, which it was contended was voluntary. The primary question considered in the opinion was the effect of the first confession on the second confession.

*McNabb v. U. S.*, 318 U. S. 332, 87 L. Ed. 819: The petitioner in this case was questioned by numerous officers over a period of two days. This case came from a lower Federal Court, and no constitutional issue was decided. The case is not an authority in evaluating the constitutionality of confessions used in State courts.

*Ward v. Texas*, 316 U. S. 547, 86 L. Ed. 1663: Here the petitioner was arrested without a warrant by a sheriff from another county; he was removed to a county more than one hundred miles away and for three days was driven about from county to county and questioned continuously by various officers who told him of threats of mob violence, and there was little probability of such event. The sheriff testified that he saw evidence of cigarette burns on the petitioner's body.

*Lisenba v. California*, 314 U. S. 219, 86 L. Ed. 166: The petitioner in this case was held incommunicado for a long period of time, was refused counsel and questioned from Sunday night until Tuesday morning. The petitioner made two confessions, one of which was not admitted, but the second one was ruled to be valid.

*White v. Texas*, 310 U. S. 530, 84 L. Ed. 1342: Here the petitioner, an illiterate farm hand, was held in jail for several days without counsel and out of touch with friends. For several nights, he was taken, handcuffed, by armed officers into the woods for interrogation. In jail, the petitioner was placed by himself, where the sheriff kept watching the petitioner and talking to him. A confession was [fol. 270] obtained after questioning by the county attorney from 11 P.M. to 3:30 A.M. the next morning. During this period, the officers who had taken him to the woods were in and out of the room.

*Chambers v. Florida*, 309 U. S. 227, 84 L. Ed. 716: Here a group of young Negroes were arrested and held in jail without formal charges. They were not permitted to see counsel or friends, and believing that they were in danger of mob violence, made confessions at the end of an all-night session, following five days of questioning, each by himself, by State officers and other white citizens and in the presence of from four to ten white men, and after a previous confession had been pronounced "unfit" by the prosecuting attorney.

*Brown v. Mississippi*, 297 U. S. 278, 80 L. Ed. 682: In this

case, there was undenied brutality, such as whipping the petitioner, hanging and then taking him down, and his body showed marks of other brutal treatment.

*Wan v. U. S.*, 266 U. S. 1, 69 L. Ed. 131: In this case, the petitioner was subjected to continuous examination for seven days by police officers; and which examination on one occasion continued throughout the night. The petitioner was sick and in pain, and the medical examiner testified that the petitioner would have confessed in order to secure relief. This was a Federal case.

*Watts v. Indiana*, 338 U. S. 49, 69 S. Ct. 1347: The petitioner, Watts, had been held for six days, during which time, except for Sunday, he was questioned by relays of officers from 5:30 or 6 P. M. until 2 or 3 A. M. He was not taken before a magistrate as required by Indiana law, and was not advised of his constitutional rights.

*Turner v. Penna.*, 338 U. S. 62, 69 S. Ct. 1352: Turner was questioned by relays of officers *from 4 to 6 hours a day* [fol. 271] *for 5 days*. He was not permitted to see friends or relatives and was not informed of his right to remain silent.

*Harris v. South Carolina*, 338 U. S. 68, 69 S. Ct. 1354: Harris was held in jail for several days, during which time he was questioned, and on one night, five officers worked in relays. On the next night, the questioning continued under the same conditions from 1:30 in the afternoon until past one the following morning; and on Wednesday afternoon, the Chief of the State Constabulary, with a half-dozen of his men, questioned Harris for an hour, and the local officers then questioned Harris for three and one-half hours longer. The sheriff then threatened to arrest petitioner's mother for having stolen property, and petitioner confessed.

In the next to the last paragraph in the opinion in *Ward v. Texas*, 316 U. S. 547, 86 L. Ed. 1663, the court lays down a series of factors or tests and states that any one of the grounds would be sufficient cause for reversal. The court will see from an examination of the cases cited in the note to support this proposition that there were always combinations of brutality or persistent questioning plus, in some cases, illegal detention or threats of mob violence. The point is that in each of the cases cited to uphold the para-



graph, the facts reveal combinations of these situations, and the cases are not decided on any one single point. The cases of *Canty v. Alabama*, 309 U. S. 629, 84 L. Ed. 988; *Lomax v. Texas*, 313 U. S. 544, 85 L. Ed. 1511; and *Vernon v. Alabama*, 313 U. S. 547, 85 L. Ed. 513, were disposed of by *per curiam* opinions, and no recitals of the facts are given.

We say, therefore, that where the findings of the State Court are supported by substantial evidence, the same should be upheld, and, in fact, as determined by the cases of *Lisenba v. California*, *supra*, and *Lyons v. Oklahoma*, *supra*, the same are final unless unconstitutionality is [fol. 272] shown by admitted facts.

### Conclusion

We shall not attempt to answer the arguments of the defendant based on the Ten Commandments, Victor Hugo's *Les Miserables* nor the editorial of the Durham Morning Herald.

All we contend is that the defendant is subject to the same laws and the same rules that all other citizens of the State are subject to and that he does not have any special privileges or exemptions. The Fourteenth Amendment was designed to afford equality in treatment. It was not designed to grant special licenses and special privileges to any group of people because of their race. This record shows a cruel and horrible offense committed on a defenseless girl and one which the defendant himself admits all acts except the actual rape. The medical evidence establishes beyond all peradventure that the victim in this case was raped. We think that the evidence in the record amply supports the verdict and the judgment of the Court, and we sincerely contend that the same should be confirmed.

Respectfully submitted, Harry McMullan, Attorney General; Ralph Moody, Assistant Attorney General.

[fols. 273-274] EXHIBIT 8 TO ANSWER—Filed July 3, 1951

IN SUPREME COURT OF NORTH CAROLINA

STATE V. CLYDE BROWN

OPINION—Filed 2 February, 1951

[fol. 275] Appeal by defendant from Moore, J., September Term, 1950, of Forsyth.

Criminal prosecution on indictment charging the defendant with rape upon one Betty Jane Clifton, a female.

On the morning of 16 June, 1950, between 8:00 a.m. and noon, some man entered the radio shop of Thomas E. Clifton on West Seventh Street, Winston-Salem, N. C., found Betty Jane Clifton, 16 or 17-year-old daughter of the proprietor alone in charge, assaulted her in a cruel and fiendish manner, raped her, and left her in a helpless condition. She was found unconscious by her father when he came into the shop around 12 o'clock.

The defendant was arrested on suspicion and held for investigation. He told various stories of his whereabouts on the morning in question. These were checked by the officers and found to be false. Finally the defendant sent for the officers of his own accord and confessed to them that he went into the radio shop, assaulted, beat and raped Betty Jane Clifton.

The defendant was indicted, tried, convicted and sentenced as the law commands in such case. The details of the crime are omitted as they are not material on the questions raised by the appeal.

Before pleading to the bill of indictment the defendant moved to quash the indictment on the ground of jury defect in the grand jury which returned a true bill in the case. The alleged defects were that the grand jury was "unlawfully constituted" in violation of defendant's constitutional rights; and further that it was drawn with a view of "limiting representation thereon of Negroes or persons of African descent."

On the hearing of the motion to quash, nothing was said about the failure of the Commissioners to comply with what is now called the "mandatory provisions" of G.S. 9-1 in

selecting the jury list from which the grand jury was drawn, and not until the case was tried and the defendant found guilty did counsel advance this contention of jury defect. Thus he now seeks to bring this forward on what he says is a motion in arrest of judgment. Both motions—the one to quash and the other in arrest of judgment—were overruled. Exceptions.

The defendant also contended on the trial that his confession was involuntary, and should have been excluded. Exception.

Verdict: Guilty as charged in the bill of indictment.

Judgment: Death by asphyxiation.

The defendant appeals, assigning errors.

Attorney-General McMullan and Assistant Attorney-General Moody for the State.

Hosea V. Price and Harold T. Epps for defendant.

[fol. 276] STACY, C. J. Putting aside any consideration of formal matters, which are not without substance, however, the only real questions sought to be presented on the appeal are: first, whether the jury list was selected from the legally prescribed source; and, secondly, whether the defendant's confession was voluntary.

*First. The Jury List.* Prior to 1947, it was provided by G.S. 9-1 that the tax returns of the preceding year for the county should constitute the source from which the jury list should be drawn, and this was then the only prescribed source. To meet the constitutional change of the previous election making women eligible to serve on juries, the statute was amended in 1947 enlarging the source to include not only the tax returns of the preceding year but also "a list of names of persons who do not appear upon the tax lists, who are residents of the county and over twenty-one years of age," to be prepared in each county by the Clerk of the Board of Commissioners.

It was made to appear on the hearing that the Commissioners used only the tax returns of the county for the preceding year in selecting the jury list for the September Term, 1950, Forsyth Superior Court, from which the grand jury was drawn that performed the accusation against the defendant. This circumstance, the defendant contends, re-

sulted in discrimination against Negroes or jurors of African descent, the race to which he belongs. The conclusion, it seems to us, is far-fetched and clearly a *non sequitur*. It rests only in imagination or conjecture. The defendant must show prejudice, other than guess or surmise, before any relief could be granted on such gossamer or attenuate ground. There was no challenge to any member of the jury, grand or petit, and no suggestion that any was disqualified. Indeed, the trial court was at pains to see that every opportunity was afforded for the selection of a fair and impartial jury.

Negroes were neither excluded nor discriminated against in the selection of either the grand or petit jury which performed in this case. One Negro woman served on the grand jury and at least one prospective Negro juror was tendered to the defendant for the petit jury and was excused or rejected by his counsel. It has been the consistent holding in this jurisdiction, certainly since the case of *S. v. Peoples*, 131 N.C. 784, 42 S.E. 814, that the intentional, arbitrary and systematic exclusion of any portion of the population from jury service, grand or petit, on account of race, color, creed, or national origin, is at variance with the fundamental law and cannot stand. On the other hand, it has also been the holding with us, consistent with the national authorities, *Akins v. Texas*, 325 U. S. 398, 89 L. Ed. 1692, that it is not the right of any party to be tried by a jury of his own race, or to have a representative of any particular race on the jury. It is his right, however, to be tried by a competent jury [fol. 277] from which members of his race have not been unlawfully excluded. *S. v. Speller*, 231 N. C. 549, 57 S. E. 2d 759; *S. v. Koritz*, 227 N. C. 552, 43 S. E. 2d 77; *Ballard v. U. S.* 329 U. S. 187, 91 L. Ed. 181. No such exclusion appears here. "The law not only guarantees the right of trial by jury, but also the right of trial by a proper jury; that is to say, a jury possessing the qualifications contemplated by law," and in the selection of which there has been neither inclusion nor exclusion because of race. *Hinton v. Hinton*, 196 N. C. 341, 145 S. E. 615; *Cassell v. Texas*, 339 U. S. 282.

Whatever may be the holdings in other jurisdictions, it is thoroughly settled by our decisions that the provisions of the statute now in focus are directory, and not mandatory, in the absence of proof of bad faith or corruption on the



part of the officers charged with the duty of selecting the jury list. *S. v. Mallard*, 184 N. C. 667, 114 S. E. 17, and cases there cited. Not only has no bad faith or corruption been shown on the part of the officers here, but none has so much as been suggested. *S. v. Smarr*, 121 N. C. 669, 28 S. E. 549. Hence, the motions to quash and in arrest were properly overruled. It may be added, also, that the motion in arrest was inappropriate for defendant's present purpose, as the matters sought to be challenged are not apparent on the face of the record. *S. v. Sawyer, ante*, 76, 62 S. E. 2d 515; *S. v. McKnight*, 196 N. C. 259, 145 S. E. 281, and cases there cited.

Finally, and in conclusion of this phase of the case, it may be said the defendant has shown no error affecting any of his substantial rights. He has pointed out no racial discrimination in the selection of the jury list, the grand jury or the petit jury which considered the indictment against him. Nor does he specifically so contend. He only says or suggests that there might have been discrimination against his race. He concedes that neither equal nor proportional representation of race is a constitutional requisite in the selection of juries. *Akins v. Texas, supra*. Indeed, proportional racial limitation is actually forbidden. *Cassell v. Texas, supra*. The defendant's position is one of possible discrimination, not one of racial imbalance in jury composition. A person accused of crime is entitled to have the charges against him performed by a jury in the selection of which there has been neither inclusion nor exclusion because of race. *Cassell v. Texas, supra*. This, the defendant has had in respect of both the grand and petit juries which performed in the case, or, at least, the contrary in respect of neither has been made to appear on the record. Hence, his claim of jury defect or irregularity is unavailing.

*Second. The Defendant's Confession.* (The only basis of challenge to the competency of defendant's confession is that he was under arrest, being held without warrant, and was in custody at the time it was given. These circumstances, taken singly or all together, unless they amounted to coercion, were not sufficient in and of themselves to render a confession, otherwise voluntary, involuntary as a matter of law and incompetent as evidence: *S. v. Stefanoff*, 206 N. C. 443, 174 S. E. 411; *S. v. Gray*, 192 N. C. 594, 135 S. E. 535; *S. v. Thompson*, 224 N. C. 661, 32 S. E. 2d 24;

*S. v. Litteral*, 227 N. C. 527, 43 S. E. 2d 84; *S. v. Speller*, 230 N. C. 345, 53 S. E. 2d 294; *S. v. Brown*, 231 N. C. 152, 56 S. E. 2d 441.

After a preliminary investigation, pursuant to the procedure outlined in *S. v. Whitener*, 191 N. C. 659, 132 S. E. 603, the trial court ruled the confession to be voluntary, and permitted the solicitor to offer it in evidence against the prisoner. *S. v. Grass*, 223 N. C. 31, 25 S. E. 2d 193; *S. v. Hammond*, 229 N. C. 108, 47 S. E. 2d 704. The ruling is fully supported by the evidence, as witness specially the following questions propounded by the court and the answers of the defendant:

"Q. Clyde, let me ask you a question. From the time you were put in custody on the 19th of June, up until after Mr. Price was employed, came over there to the jail to see you, after you made all the statements you made in this case, were you ever mistreated in any manner by these officers, any of the officers? A. No.

"Q. Was any violence used or threatened to be used against you? A. No, sir.

"Q. Did anybody hit you or threaten to hit you? A. No, sir.

"Q. Did anybody threaten to do you any physical injury of any kind? A. No, sir.

"Q. Did anybody offer you any reward or hope of reward to make any statement? A. No sir.

"Q. Did anybody tell you that you'd get out lighter, they'd try to help you get out lighter if you'd make a statement? A. No.

"Q. And were you, at different times—at least on two occasions, I believe you said—warned that you did not have to make a statement? A. Yes sir.

"Q. You were warned at least once before you made this final statement? Is that correct? A. Yes sir.

"Q. At that time you were told that any statements which you might make would be used against you? A. Yes sir."

It is well understood that a free and voluntary confession is admissible in evidence against the one making it, because it is presumed to flow from a strong sense of guilt or from a love of the truth, both of which are, at times, compelling

motives and powerful aids in the investigation of crimes. Just the reverse is true, however, in the case of an involuntary confession, since a statement wrung from the mind by the flattery of hope or by the torture of fear, comes in such questionable manner as to afford no assurance of its verity, and merits no consideration. *S. v. Anderson*, 208 N. C. 771, 182 S. E. 643; *S. v. Patrick*, 48 N. C. 443. A confession [fol. 279-283] is voluntary in law when—and only when—it was in fact voluntarily made: *S. v. Jones*, 203 N. C. 374, 166 S. E. 163; *Ziang Sung Wan v. United States*, 266 U. S. 1, 69 L. Ed. 131.

The observations of *Henderson, J.*, in *S. v. Roberts*, 12 N. C. 259, are sound and presently pertinent: "Confessions are either voluntary or involuntary. They are called voluntary when made neither under the influence of hope or fear, but are attributable to that love of truth which predominates in the breast of every man, not operated upon by other motives more powerful with him, and which, it is said, in the perfectly good man cannot be countervailed. These confessions are the highest evidences of truth, even in cases affecting life. But it is said, and said with truth, that confessions induced by hope or extorted by fear are, of all kinds of evidence, the least to be relied on, and are therefore entirely to be rejected."

The court's ruling on the voluntariness of the confession is supported by the defendant's own testimony given on the preliminary inquiry. The contentions of error in its admission are without force or substance.

The remaining exceptions, noted by the defendant on the trial, have been abandoned by him as they are not brought forward in his brief and no argument has been advanced, or authority cited, in support thereof. Hence, under the rule, they are deemed feckless or without merit and are treated as abandoned. Rule 28 of the Rules of Practice in the Supreme Court, 221 N. C. 562.

On the record as presented, the verdict and judgment will be upheld.

No error.

[fol. 284]

[File endorsement omitted]

EXHIBIT 2 TO ANSWER—Filed July 5, 1951

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER  
TERM, 1950

No. —

CLYDE BROWN, Petitioner,

vs.

STATE OF NORTH CAROLINA; Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT  
OF NORTH CAROLINATo the Honorable, the Chief Justice of the United States  
and Associate Justices of the Supreme Court of the United  
States:

The petitioner herein prays that a writ of certiorari issue to review the judgment of the Supreme Court of North Carolina, affirming a judgment of conviction by the Superior Court of Forsyth County, North Carolina, of petitioner on the charge of rape and the sentence of execution imposed pursuant to said conviction.

## Statement of the Matter Involved

Petitioner Clyde Brown, an illiterate Negro of about twenty years of age, was tried and convicted in the Superior Court of Forsyth County, North Carolina, of assaulting and raping a young white girl named Betty Jane Clifton. The crime was allegedly committed on the 16th day of June, 1950, and the defendant was brought before the court for trial at the September Term, 1950 of the Forsyth County Superior Court. At the time of his arraignment, and before pleading to the bill of indictment and before the selection of the jury, petitioner entered a special appearance and made a motion to quash the bill of indictment (Record, p. 22), upon the ground that the grand jury returning the [fol. 285] indictment against the the defendant was unlawfully constituted, in violation of the rights of the defendant



as guaranteed him under the Fifth and Fourteenth Amendments to the Constitution of the United States, in that the members of said grand jury were selected and drawn with a view and purpose of systematically limiting the representation thereon of persons of the Negro race, to which race petitioner belongs, with the result that petitioner and members of his race are unlawfully discriminated against. The issue raised by petitioner's said motion was tried upon evidence presented, and the trial judge thereafter entered an order denying said motion (Record, pp. 49-52). Thereafter, in amplification and extension of his motion to quash the bill of indictment, petitioner, at the termination of the trial (Record, pp. 205-208), made a motion in arrest of judgment in which he sought to re-assert and expand the basis of his previous motion. This last motion the trial court also denied (Record, p. 207).

During the course of petitioner's trial, over the timely objection of the defendant, the State was allowed to introduce into evidence statements of petitioner in the nature of confessions of commission of the alleged crime. (Record, pp. 94-133). Petitioner contends that the statements sought to be introduced as confessions were inadmissible for that they were unlawfully obtained, in violation of the guarantees of the Fourteenth Amendment to the Constitution of the United States. Upon the trial of issue thus raised, the trial Court likewise overruled the petitioner's objection. Thereafter, upon trial of petitioner before the jury, he was convicted of the capital crime of rape, without recommendation of mercy, and the sentence imposed upon him was that of death by asphyxiation. (Record, pp. 208-209). This latter conviction and sentence have been upheld by the Supreme Court of North Carolina, in an opinion filed on the 2nd day of February, 1951 (State vs. Brown, 233 N. C. 202, 63 S. E. 2d 99). Petitioner is presently incarcerated on death row in the State Prison of North Carolina. The date of execution of petitioner was fixed for February 23, 1951, but by order dated February 13, 1951, signed by Stacy, C. J., of the Supreme Court of North Carolina, the sentence of [fol. 286] death has been stayed pending the final determination of the instant petition by this Court.

Simultaneously with the filing of the instant petition and

brief, petitioner moves this Court by affidavit for leave to proceed *in forma pauperis*. Accordingly, the instant petition and brief are presented to this Court in type-written form. The record in the instant petition is the record of the trial of this cause in the Superior Court of Forsyth County at the September, 1950 Term of said Court, as certified to the Supreme Court of North Carolina by the Clerk of the Superior Court of Forsyth County, which record, together with a certified copy of the opinion of the Supreme Court of North Carolina, filed on February 2, 1951, as aforesaid, affirming the judgment and sentence rendered against petitioner, a certified copy of petition to stay execution of judgment and sentence pending the determination of the issue raised by the instant petition, and a certified copy of the Order entered by Stacy, C. J., staying execution of judgment and sentence, has been forwarded by the Clerk of the Supreme Court of North Carolina to this Court upon the request of petitioner.

The evidence adduced by the state during petitioner's trial discloses that on Friday, June 16, 1950, at or around noon-time, one Betty Jane Clifton, a 17 year old high school student, was cruelly beaten and raped in the radio shop operated by her father, Thomas E. Clifton, on West 7th Street, in the City of Winston-Salem, North Carolina, which she was tending in the absence of her father. The evidence discloses that Betty Jane Clifton was beaten about the head with a rifle butt, or some other blunt instrument; she was found in the shop in an unconscious condition and removed to a local hospital where she hovered between life and death for many days. The defendant Clyde Brown was seen in the vicinity of the radio shop close to the time of the happening of the alleged crime, and was later arrested and held for some time for investigation in connection therewith. Various angles of his alleged connection with the crime were run down by local police officers, and after several days of detention without formal charge, the petitioner allegedly confessed the commission of the crime. Upon these representations of the State, petitioner was [fol. 287] determined by the jury's verdict to have been the perpetrator of the crime.

## Jurisdiction

The jurisdiction of this Court is invoked under Section 1257(3) of title 28 of the United States Code, 1948 Revisal.

### Constitutional Provisions Involved

1. United States Constitution, Amendment XIV, Section 1:

“ . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

2. United States Constitution, Amendment V:

“ . . . nor shall any person . . . be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . . ”

### Question Involved

1. Whether or not there has been unlawful discrimination against persons of the Negro race in the selection and constitution of grand juries in Forsyth County, including the grand jury which indicted petitioner, solely for reason of race or color, resulting in deprivation of the equal protection of the laws guaranteed petitioner by the Fourteenth Amendment to the United States Constitution.

2. Whether the alleged confessions admitted in evidence were obtained as a result of fear, duress, coercion, or other unlawful circumstances, whereby the conviction of and sentence imposed upon petitioner resulted in a deprivation of his life and liberty without due process of law, in violation of the Fourteenth Amendment to the United States Constitution.

[fol. 288] Reasons Relied on for Allowance of the Writ

1. For reasons set out at pages 8 to 12 of the brief in support of the petition herein, the denial of the motion by petitioner challenging the grand jury which indicted him, was in conflict with the applicable decisions of this court:

*Virginia v. Rives*, 100 U. S. 313, 322; *Strauder v. West Virginia*, 100 U. S. 303; *Ex Parte Virginia*, 100 U. S. 339; *Neal v. Delaware*, 103 U. S. 370; *Bush v. Kentucky*, 107 U. S. 110; *Gibson v. Mississippi*, 162 U. S. 565, 584, 591; *Carter v. Texas*, 177 U. S. 442; *Martin v. Texas*, 200 U. S. 316, 321; *Norris v. Alabama*, 294 U. S. 587; *Hale v. Kentucky*, 303 U. S. 613; *Pierre v. Louisiana*, 306 U. S. 354; *Smith v. Texas*, 311 U. S. 128; *Hill v. Texas*, 316 U. S. 400; *Patton v. Mississippi*, 332 U. S. 463; *Brunson v. North Carolina*, *King v. North Carolina*, *Jones v. North Carolina*, *James v. North Carolina*, *Watkins v. North Carolina*, 333 U. S. 851; *Cassell v. Texas*, 339 U. S. 282.

2. For the reason set forth at pages 12 to 15 of the brief in support of the petition herein, the admission into evidence of the alleged confessions of the petitioner, in view of the undisputed evidence in the case concerning the alleged confessions, is in conflict with the applicable decisions of this Court. *Brown v. Mississippi*, 297 U. S. 278; *Chambers v. Florida*, 309 U. S. 227; *Canty v. Alabama*, 309 U. S. 629; *White v. Texas*, 309 U. S. 631; *id.*, 310 U. S. 530; *Lomax v. Texas*, 313 U. S. 544; *Vernon v. Alabama*, 313 U. S. 547; *Ward v. Texas*, 316 U. S. 547; *Ashcraft v. Tennessee*, 332 U. S. 143; *id.* 327 U. S. 274; *Malinski v. New York*, 324 U. S. 401; *Haley v. Ohio*, 332 U. S. 596; *Lee v. Mississippi*, 332 U. S. 742; *Watts v. Indiana*, 338 U. S. 49; *Turner v. Pennsylvania*, 338 U. S. 62; *Harris v. South Carolina*, 338 U. S. 68.

#### Conclusion

For the reasons stated, it is respectfully submitted that this petition for writ of certiorari should be granted.

Clyde Brown, Petitioner. Herman L. Taylor, Hosea V. Price, Harold T. Epps, Attorneys for Petitioner.

[Vol. 289]

BRIEF IN SUPPORT OF PETITION

#### Opinion Below

The opinion of the Supreme Court of North Carolina affirming the judgment and sentence imposed upon petitioner by the Superior Court of Forsyth County is reported at 233 N. C., 202; 63 S. E. 2nd 99.



## Jurisdiction

The basis of this Court's jurisdiction are set forth in the accompanying petition at page 4 of said petition.

## Specification of Error

1. It was error for the Trial Court to deny petitioner's motion to quash the bill of indictment, and, therefore, it was error for the Supreme Court of North Carolina to affirm the said judgment and sentence.

2. It was error for the Trial Court to admit in evidence the alleged confessions of petitioner, and therefore, it was error for the Supreme Court of North Carolina to affirm the judgment and sentence entered.

[fol. 290]

## Summary of Argument

The limitation of the number of Negroes who are permitted to serve on grand and petit juries in Forsyth County, through invocation of what appears to be a "quota system," is in conflict with the equal protection of the laws provision of the Fourteenth Amendment to the United States Constitution, in that said practice results in, and has resulted in arbitrary exclusion of Negroes from such juries and a discrimination against members of said race, in particular, against this defendant. Although the Negro population has over the years constituted about 31.9 per cent of the total population of Forsyth County, it is an uncontroverted fact that over the same years, never has there been at any one time more than one Negro on a grand jury, nor more than four or five Negroes on a petit jury in Forsyth County, and even then such representation of Negroes on said juries has been intermittent. It is and should be more or less obvious, therefore, that were the same status applied and policies practiced in the selection of Negroes as jurors as is the case with jurors drawn from other racial groups, the law of averages alone would have precluded the situation which obtains and has obtained with respect to the constitution of juries in Forsyth County.

The alleged confessions of petitioner were obtained under circumstances which, when laid beside the measurements long promulgated by this Court, necessarily made them inadmissible. The undisputed facts show that the petitioner,

who is a young, illiterate, southern Negro, was arrested without a warrant in the early morning of June 19, 1950, and held in custody without formal charge until June 24, 1950, and was not given a preliminary hearing until July 7, 1950. All during the time of his unlawful detention, petitioner was repeatedly questioned for several hours at a time by police officers in relays until he made the statements purporting to be confessions, and no effort was made to provide petitioner with counsel or make counsel available to him until after he had been subjected to the said inquisitorial treatment. The admission into evidence, therefore, of confessions obtained under such circumstances, is in conflict with the due process clause of the Fourteenth Amendment to the United States Constitution.

[fol. 291]

## ARGUMENT

### Point I

Petitioner has been Deprived of the Equal Protection of the Law by the Discriminatory and Arbitrary Exclusion of Negroes from (Grand and/or) Petit Juries in Forsyth County, Solely for Reason of Race, Including the Grand Jury which Indicted and the Petit Jury which Convicted Petitioner.

There is and can be no controversy with respect to the constitutional principle herein involved, as it is one that has long been established as the fundamental law. Consequently, the only issue that usually arises in this instance is whether or not the constitutional proscription involved has been disregarded. This Court is familiar with the statutes and procedure governing the selection of Grand and Petit Jurors in the State of North Carolina. Just about two and one-half years ago this Court had occasion, in a *per curiam* opinion of one word, to reverse five convictions arising out of the State of North Carolina, on the grounds that Negroes had been systematically and arbitrarily excluded from grand and petit juries in Forsyth County, North Carolina, the very same county from which the instant proceeding comes. *Brunson v. North Carolina*, 333 U. S. 851; *Jones v. North Carolina, id.*; *James v. North*

*Carolina, id.*; *King v. North Carolina, id.*; *Watkins v. North Carolina, id.* In each of the foregoing instances, Negroes were indicted by grand juries in Forsyth County on which there were no Negroes and under circumstances which revealed that for many years no Negroes had ever served on grand juries; also, in each instance, contrary to the instant situation, although Negroes were included on the convicting petit juries, the number of Negroes on such juries then and in the past years was disproportionately small to the number of Negroes residing in Forsyth County eligible for jury service. As has been hereinbefore set out, the instant proceeding arises out of the same county of the State of North Carolina as the *Brierson, Jones, James, and Watkins* cases, to wit, Forsyth County. It is the contention of petitioner that the situation which obtained at the time of his trial represented an attempt on the part of the jury commissioners of Forsyth County to give only token compliance to mandate of this Court as set out in the aforementioned cases; that is, instead of approaching the inclusion of qualified Negroes on grand and petit juries in Forsyth County as a matter of general and ordinary jury selection procedure, petitioner contends that the facts in evidence and the circumstances herein show that the said jury commissioners have studied and purposefully limited the number of Negroes on grand juries to no more than one or two at a given time (R. 36-37), and the number of Negroes called to serve on petit juries to no more than four or five (R. 40-42). This Court has stated, in *Cassell v. Texas*, 339 U. S. 282, 286:

"If . . . commissioners should limit proportionally the numbers of Negroes selected for grand jury service, such limitation would violate our Constitution."

And, at 287:

"Proportional racial limitation is therefore forbidden. An accused is entitled to have charges against him considered by a jury in the selection of which there has been neither inclusion nor exclusion because of race."

See also *Virginia v. Rives*, 100 N. S. 322, 323.

The United States Census for 1940 discloses that the total population of Forsyth County was, as of said census, 126,475, consisting of 41,152 Negroes and 85,323 whites, the per cent of Negroes being 32.5% of the total. This census further shows that the total number of persons in Forsyth County 21 years of age and over were 75,556, of which 25,057 are Negroes, or approximately one-third of the total. It is thus apparent from the record, and it is a fact, that the foregoing proportion of Negroes in Forsyth County has never been even remotely reflected in the proportion of Negroes who have served on juries in Forsyth County. While it is an accepted principle that proportional representation of Negroes or any other racial group on every jury is not required, *Cassell v. Texas, supra*, disproportional representation of Negroes on juries in a given [fol. 293] community for a number of years, when considered in the light of the proportion of Negroes of the total population, is strong evidence of the violation of the rights claimed, and one would have to be unduly credulous to accept the argument that the inclusion of Negroes on jury panels in consistently and unvarying small numbers, such as one or two at a time, was solely the handiwork of chance. As this Court said in *Smith v. Texas*, 311 U. S. 128, 131:

"Chance and accident alone could hardly have brought about the listing for grand jury service of so few Negroes from among the thousands shown by the undisputed evidence to possess the legal qualifications for jury service.

Although, the statute of the State of North Carolina (Gen. Stats. of N. C. 1943, Sec. 9-1) charges the commissioners of the several counties with the affirmative duty of resorting to the tax records of their respective counties and other sources for the purpose of fairly apprising themselves of the persons who are eligible for jury duty, the record in this case shows that the jury commissioners of Forsyth County, without further inquiry or consideration (R. 30, 37, 43) accepted as the jury panel for the period during which petitioner was indicted and tried a list of 40,000 names taken from the county tax records for the year 1948, which was tendered to them for this purpose,



(R. 30, 31, 43). At the same time, although the commissioners admittedly knowingly failed to resort to sources other than tax records to obtain the names of persons who were qualified for jury service, although the aforementioned statute provides for the same, they sought to justify the consistent paucity of Negroes on grand and petit juries in Forsyth County upon the ground that Negroes comprise only about 16% of the taxpayers in Forsyth County (R. 36, 48). And, even if such contention be conceded, it is an accepted and a recorded fact that representation of Negroes on juries in Forsyth County has never even approximated 16% of the persons called for jury service in said County. Irrespective of the decision of the state courts on the federal right which was set up and claimed, it is the province [fol. 294] of this Court to inquire not merely whether it was denied in express terms, but also whether it was denied in substance and effect. — *Norris v. Alabama*, 294 U. S. 587, 590. Accordingly, whether a state law prescribes or does not prescribe a mode of jury selection which is designed to bring about equal protection of the laws in the administration thereof, as required by the Fourteenth Amendment, if the administrative agency which is charged with the duty of selecting juries pursues a course, either through design or ignorance, which in fact results in the arbitrary exclusion of members of a given race from such juries, an infraction of the Constitutional requirement thus results. *Neal v. Delaware*, 103 U. S. 370; *Carter v. Texas*, 177 U. S. 442.

It appears as a matter of deduction from the record that no Negro served on the trial jury which convicted petitioner (R. 24), and it further appears from the record that only one Negro was on the indicting grand jury (R. 39), in continuing observance of what petitioner contends is a studied and purposeful program of limiting the number of Negroes on grand and petit juries in Forsyth County. It is unquestioned that indictment and conviction of a Negro by a grand and petit jury from which Negroes have been purposefully excluded solely for reasons for race deprives that defendant of equal protection of the laws. *Strauder v. West Virginia*, 100 U. S. 303; *Neal v. Delaware*, *supra*; *Bush v. Kentucky*, 107 U. S. 110; *Norris v. Alabama*, *supra*; *Hale v. Kentucky*, 303 U. S. 613; *Pierre v. Louisiana*, 306 U. S. 354;

*Smith v. Texas, supra; Hill v. Texas*, 316 U. S. 400; *Patton v. Mississippi*, 332 U. S. 463; *Brunson et als., v. North Carolina, supra*. Purposeful exclusion is shown even where some Negroes do serve as jurors if the proportion of Negroes on juries is infinitesimal in comparison with the proportion of Negroes in the community eligible to act as jurors. *Pierre v. Louisiana, supra; Smith v. Texas, supra*. The essential inquiry is not whether Negroes are proportionally represented on any one jury, but whether a historical pattern of Negro participation on juries demonstrates deliberate exclusion. *Patton v. Mississippi, supra; Akins v. Texas*, 325 U. S. 398. It is submitted, therefore, that the facts in this case and the applicable law forcefully [fol. 295] demonstrate that petitioner was denied equal protection of the laws in this instance and that the state courts committed error in denying his motion to quash the bill of indictment and the trial jury panel.

## Point II

The Conviction of Petitioner Deprives Him of His Life and Liberty Without Due Process of Law in View of the Admission Into Evidence of His Alleged Confessions.

The alleged assault and rape of the prosecuting witness, Betty Jane Clifton, a young high school girl, occurred on June 16, 1950. The defendant, Clyde Brown was reported by witnesses for the state to have been seen in the vicinity of the radio shop in which the incident occurred at or around the time of its alleged occurrence (R. 82 et seq.). The petitioner was arrested without a warrant and held for questioning in connection with the crime at or around 12:30 a.m. on the morning of June 19th (R. 96). The undisputed evidence is that the defendant was held in custody until the 24th day of June, 1950 before he was formally charged with the commission of the crime and was not given a preliminary hearing in connection therewith until the 7th day of July, 1950, more than 18 days after his apprehension. (R. 95 et seq.). It is also undisputed that during the time he was held in custody, the defendant was questioned repeatedly and persistently by police officers of the City of Winston-Salem in relays until they succeeded in obtaining from petitioner the sort of confession they

desired (R. 95 et seq.). Although the officers contended that they warned petitioner of his rights, they made no effort to obtain counsel for petitioner until they had carried him through a searing inquisition and he had given them the incriminating statements.

General Statutes of North Carolina, 1943, Sec. 15-46 provides:

"Every person arrested without warrant shall be either immediately taken before some magistrate having jurisdiction to issue a warrant in the case, or else be [fol. 296] committed to the county prison, and, as soon as may be, taken before such magistrate who, on proper proof, shall issue a warrant and thereon proceed to act as may be required by law."

Although specifically enjoined so to do by the foregoing statutory provision, as has been hereinbefore set out, the officers who took petitioner into custody held him from the 19th day of June until the 24th day of June, a period of 5 days, without formally charging him with crime, and from the 19th day of June until the 7th day of July, a period of about eighteen days, before granting him a preliminary hearing (R. 98, 99). It is thus apparent that during the time petitioner was continually questioned and at the time the incriminating statements were elicited, he was being detained in violation of the laws of the State of North Carolina.

While the officers who had petitioner in custody contended that they advised him of his right, including the right to consult with counsel, it is apparent from the record, as aforesaid, that counsel was not made available to petitioner until after the incriminating statements had been made. In determining whether or not the warning allegedly given petitioner, even if it should be conceded that such warning was given, meets the requirements of due process, it is submitted that this Court should take into consideration as a part of the circumstances the lack of intelligence on the part of the defendant as will certainly be revealed from a careful perusal on the whole record. A bald statement by officers to one of petitioner's intelligence and background in a situation of this kind that he has certain rights,

knowing that he is in no position to avail himself of such rights without the affirmative help of his admonishers, it is submitted, becomes a vain and useless act. Petitioner does not contend that the incriminating statements were obtained through physical violence, but he does contend that they were induced by the coercive circumstances set out in the record, and as such are similarly inadmissible.

Since *Brown v. Mississippi*, 297 U. S. 278, it has been the undeviating practice of this Court to reverse convictions after trials in which there was admitted into evidence confessions induced by physical and mental coercion. *Chambers v. Florida*, 309 U. S. 227; *Canty v. Alabama*, 309 U. S. 629; *White v. Texas*, 309 U. S. 631; *id.*, 310 U. S. 530; *Lomax v. Texas*, 313 U. S. 544; *Kernon v. Alabama*, 313 U. S. 547; *Ward v. Texas*, 316 U. S. 547; *Ashcraft v. Tennessee*, 322 U. S. 143; *id.*, 327 U. S. 274; *Malinski v. New York*, 324 U. S. 401; *Haley v. Ohio*, 332 U. S. 596; *Lee v. Mississippi*, 332 U. S. 742; *Watts v. Indiana*, 338 U. S. 49; *Turner v. Pennsylvania*, 330 U. S. 62; *Harris v. South Carolina*, 338 U. S. 68. In view of the fact that it is apparent from the record that, aside from the alleged confessions, a conviction of petitioner would have to rest upon flimsy and doubtful circumstance evidence, it is submitted that it is particularly appropriate for this Court to review the facts herein to determine independently whether they spell out the type and sort of coercion which the foregoing authorities have determined to be unlawful.

*Ward v. Texas*, 316 U. S. 547, 555, provides the point of departure for evaluating the undisputed and uncontradicted evidence which exists in this case, for in that case Byrnes, J., stated the applicable criteria:

"This Court has set aside convictions based upon confessions extorted from ignorant persons who have been subjected to persistent and protracted questioning, or who have been threatened with mob violence, or who have been unlawfully held incommunicado without advice of friends or counsel, or who have been taken at night to lonely and isolated places for questioning. Any one of these grounds would be sufficient cause for reversal." (Emphasis added).



The youthful age of petitioner (*Chambers v. Florida, supra*; *Haley v. Ohio, supra*); his illiteracy (*Harris v. South Carolina, supra*; *White v. Texas, supra*); brutality of the crime involved (*Chambers v. Florida, supra*; *Ward v. Texas, supra*); his detention without hearing or arraignment. (*Harris v. South Carolina, supra*; *Turner v. Pennsylvania, supra*; *Watts v. Indiana, supra*; *Haley v. Ohio, supra*), and without any communication with friends or counsel (*Harris v. South Carolina, supra*; *Ashcraft v. Tennessee, supra*; *White v. Texas, supra*; *Chambers v. Florida, supra*); and the harrowing questioning which led up to the alleged confessions, all combined to make those confessions tainted and constitutionally inadmissible.

[fols. 298-302] It is well settled that even where proof apart from a confession in evidence might be deemed sufficient to found a conviction, although, as aforesaid, such is not the case here, such proof will not influence the necessity for reversing a judgment of conviction where the confession was involuntary or coerced. *Haley v. Ohio, supra*, at 599; *Malinski v. New York, supra*, at 404.

It is submitted, therefore, that the state courts erred in admitting said confessions in evidence.

### Conclusion

The petition for writ of certiorari should be granted, and upon review the judgment of conviction and sentence should be reversed.

Respectfully submitted, (Herman L. Taylor, Hosea V. Price, Harold T. Epps, Attorneys for Petitioner.

[fol. 303]

[File endorsement omitted]

## EXHIBIT 7 TO ANSWER—Filed July 5, 1951

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER  
TERM, 1950.

No. 488, Misc.

CLYDE BROWN, Petitioner,

VS.

THE STATE OF NORTH CAROLINA, Respondent

Brief of the State of North Carolina, Respondent, Opposing  
Petition for Writ of Certiorari

## STATEMENT OF THE CASE

The Petitioner, Clyde Brown, seeks by writ of *certiorari* to have the Supreme Court of the United States review a decision of the Supreme Court of North Carolina affirming a judgment of the Superior Court of Forsyth County, North Carolina, imposing sentence of death upon the Petitioner based upon a conviction for the crime of rape. The opinion of the Supreme Court of North Carolina was filed February 2nd, 1951, and is reported as *State v. Clyde Brown*, 233 N. C. 202, 63 S. E. (2d) 99.

[fol. 304]

## Facts

The record before the Supreme Court of North Carolina has been certified to this Court, and we will refer to the record by the initial "R" and by using the usual initial "p" for the page number.

On June 16, 1950, the Petitioner, Clyde Brown, a Negro man, went into the radio shop of Thomas E. Clifton on West Seventh Street, in Winston-Salem, and raped his daughter, Betty Jane Clifton, a high school girl in the eleventh grade. The victim of this assault, Betty Jane Clifton, was cruelly beaten and maltreated in a fiendish manner and was taken to the hospital where she remained unconscious and hovered between life and death for many days. (See R. pp. 93, 60, 61 and 62. See evidence of Dr. Dale on R. p. 70. See evidence

of nurse Nancy Strader on R. p. 179.) The Petitioner beat the victim, Betty Jane Clifton, with a rifle and perhaps other weapons, and there was no doubt but what she was raped because blood flowed from her private parts and soiled her underclothes, and doctors testified that penetration had been accomplished. (See evidence of Dr. Harry W. Goswick on R. p. 60 and Dr. F. P. Dale on R. p. 70). The victim, Betty Jane Clifton, remembered very little about what happened as will be seen from her evidence beginning on R. p. 78.

The Petitioner, Clyde Brown, was seen in the vicinity of the radio shop close to the happening of this event as will be seen by the evidence beginning on R. p. 82. The Petitioner was arrested and held for some time for investigation. He told various stories of his whereabouts and persons he had seen and talked with, which were investigated patiently by the police officers of Winston-Salem and were found to be untrue. He finally sent for the officers of his own accord and admitted that he went into the radio shop and assaulted, beat and raped Betty Jane Clifton. As is customary in a case of this kind, the police officers gave evidence on the question of the competency of the Petitioner's confession, and the police officers likewise testified before the jury after the confession had been ruled upon, and the Judge found that the same should be submitted to the [fol. 305] jury, all according to the practice that prevails in this State. For the various stories that the Petitioner told, as well as his confession, we refer the Court to the evidence of the officers beginning on R. p. 135 and extending continuously through R. p. 666.

The Petitioner, during this time, told the police officers where to find the clothes which he had worn on this occasion (R. p. 42); and he also told the officers where to find the billfold that belonged to the victim, Betty Jane Clifton, and the officers went and found the billfold hidden in the place as related by the Petitioner. (R. p. 147)

## Argument

## I

# Petitioner Has Not Shown Intentional, Arbitrary and Systematic Exclusion of Eligible Persons of His Race from Grand Jury Service

The Petitioner's motion to quash the bill of indictment because of race exclusion from the Grand Jury will be found on R. p. 22. It will be seen that the Petitioner does not allege in any manner in what way members of his race were excluded in violation of his constitutional rights. The only specific thing he alleges is that the Grand Jury was drawn "with a view to and purpose in mind of systematically limiting representation thereon of Negroes or person of African descent."

We submit that the allegations in this motion are of such a general nature that they do not even meet the liberal requirements of criminal pleading. Certainly the grounds upon which a motion to quash is based should be set forth in some detail, and such is the holding in many jurisdictions.

Shreve v. U. S., 77 Fed. (2d) 2;

Colbeck v. U. S., 10 Fed. (2d) 401;

Whitman v. State, 122 So. 567 (Fla.);

State v. Ellington, 96 So. 529 (La.);

[fol. 306] Boyd v. State, 143 N. E. 355 (Ind.);

People v. Damazoni, 223 P. 1003 (Okl.);

State v. Skinner, 230 P. 537 (Wyo.);

State v. DeBoard, 194 S. E. 349 (W. Va.);

Ingham v. State, 172 N. E. 401 (Ohio);

Deibert v. State, 133 A. 847 (Md.).

After the Petitioner had been convicted, he again attempted to raise the question of jury discrimination in more detail by a motion in arrest of judgment. (R. pp. 205, 206 and 207.) The question of jury discrimination cannot be raised in North Carolina by a motion in arrest of judgment.

State v. Brown, 233 N. C. 202, 63 S. E. (2d) 99;

State v. Brown, 218 N. C. 415, 11 S. E. (2d) 321;

State v. McCollum, 216 N. C. 737, 6 S. E. (2d) 503;

State v. Linney, 212 N. C. 739, 194 S. E. 470.



Although there was not sufficient allegation in the motion to quash, the Petitioner was allowed to introduce evidence for the purpose of showing, if he could, that the Board of County Commissioners had not properly and constitutionally administered the jury statute for the selection of the Grand Jury which indicted him. We think the Petitioner failed to do this, and we will attempt to show the Court our reasons.

The Petitioner shows the total population of both white and colored by the Census of 1940 and 1950, and the poll tax listings for the year of 1950; but it will be noted that no figures are shown for the total tax listings, and the jury list was made up by the Commissioners from the total tax listings. *It will further be seen from the evidence of Howard W. Floyd, the Courtroom Clerk, that one Negro woman, Mrs. Mary Y. Matthews, served on the Grand Jury that found the bill against the defendant. (See R. pp. 38 and 39.)* This present Grand Jury was drawn at the meeting of June, 1950, when sixty names were drawn from which the Grand Jury was taken which found this bill. (R. p. 45.) It will also be seen from the evidence of Nat S. Crews, the [fol. 307] County Attorney, that he attended all of the meetings and that there had been no discrimination between white and colored people in the selection of the jury. On R. p. 46 will be found the public-local act under which the jury is drawn in Forsyth County. It will be seen that the Grand Jury of Forsyth County is drawn on the 25th day of June of each year so that the Grand Jury serves for a term of six months. The Court will also see from evidence of Howard W. Floyd, beginning on R. p. 38, that several members of the colored race were drawn on the jury, and on R. p. 42 he testifies that he has yet to see a jury in the box in the courtroom in Forsyth County when there was not at least one member of the Negro race on the jury. *On R. p. 24 it is agreed in a stipulation between counsel that out of the thirty-seven regular jurors called, there were at least eight members of the Negro race and that out of the special veniremen called, at least three were members of the Negro race.* When we bear in mind also that there was one Negro woman who served on the Grand Jury that found the bill of indictment against the Petitioner, it is hard to see that there

has been any jury discrimination against the eligible colored jurors.

It further appears from the evidence of John Click, who is the I. B. M. Supervisor in the office of the Tax Supervisor of Forsyth County, that he furnished the Register of Deeds' office a list of all people eligible for jury duty according to the tax records. This list is compiled by the I. B. M. machine by running the cards through the machine, and a list is thus tabulated with all of the names and addresses. Juveniles are excluded and nonresidents, as well as deceased persons. This list is tabulated every two years. These cards are not separated as to white and colored taxpayers, but there is a code number on the card which allows colored taxpayers to be separated from white taxpayers if desired. The County Commissioners, however, do not follow the code, and only people who are familiar with the I. B. M. procedure would know what the code number indicated. There is no evidence whatsoever that any distinction was made in the drawing of the jury, and this is shown [fol. 308] not only by the Petitioner's own witnesses but also by the State's evidence which begins on R. p. 40. All of the witnesses who had anything to do with the jury list testified that there had been no exclusion of anyone because of race, and the Petitioner did not place upon the witness stand a single person of the colored race who was eligible to serve on the jury but who had never been called for jury duty.

The fact that in this case there was a code designation on the I. B. M. cards and on the list which separated the colored and white persons does not show discrimination.

State v. Walls, 211 N. C. 487 (Certiorari denied in 302 U. S. 635, 82 L. Ed. 494);

State v. Middleton, 36 S. E. (2d) 472 (S. C.);

U. S. v. Dennis, 183 Fed. (2d) 201 (Ad. Op. No. 3).

In the case of U. S. v. Dennis, *supra*, which is the famous trial of the Communists in New York, Mr. L. Hand, Circuit Judge, writing the opinion of the Court for the Second Circuit, on this point, said:

"Nothing need be added, regarding the asserted discrimination against Negroes. So far as they were not

represented on the list in proportion to their numbers, there is no evidence that it was on account of their race; and the disproportion is adequately explained by the fact that they are among the poorer groups. The argument drawn from the presence of the letter 'C' on their cards is without basis; it is understandable why the clerks should wish to know how many Negroes were on the list. The very fact that the Supreme Court had several times decided that they must be represented was occasion enough; any clerk would wish to avoid any color of a charge that he had discriminated against them. Had the list been drawn up for this particular prosecution, there might be some plausibility in finding a motive for keeping down the possibilities of Negroes on the jury, so great have been the wrongs done that race; but only a jaundiced mind can suppose that a public official in New York, having no personal stake in the event, would hazard the risk of detection for the sake of venting his bias against the race generally."

[fol. 309] We must call attention again to the fact that the Petitioner has not shown that any colored persons were available for jury duty that had not served or that had been excluded. As we will show later on, the burden was on the Petitioner to make this showing, and the Petitioner has not shown the long-continued exclusion, the purposeful, intentional, arbitrary exclusion of eligible representatives of the Negro race which warrants the inference or prima facie case requiring proof and rebuttal on the part of the State. For example, in the case of *Norris v. Alabama*, 294 U. S. 597, 79 L. Ed. 1074, the Petitioner placed upon the witness stand many members of the Negro race who were eligible for jury service but who had never served on the jury during their life-time.

It is not denied that under the Fourteenth Amendment, the eligible citizens of Petitioner's race are entitled to their chance to serve on the various juries and cannot be deprived of this chance by design. But fairness in selection does not require a guaranteed proportional representation

of the Petitioner's race on every jury selected and constituted.

Cassell v. Texas, — U. S. —, 94 L. Ed. 563 (Ad. Op. No. 13);

Akins v. Texas, 325 U. S. 398, 89 L. Ed. 1692;

Thomas v. Texas, 212 U. S. 278, 53 L. Ed. 512;

Virginia v. Rives, 106 U. S. 313, 25 L. Ed. 667;

Swain v. State, 215 Ind. 259, 18 N. E. (2d) 921, 926;

Zimmerman v. State, — Md. —, 59 A. (2d) 685 (Certiorari denied, 93 L. Ed. (Ad. Op. No. 7) 425);

16 C. J. S. (Constitutional Law), Sec. 540.

The type of discrimination condemned is said to be "purposeful discrimination" (Akins v. Texas, 325 U. S. 398, 89 L. Ed. 1692), or a "long-continued, unvarying, and wholesale exclusion of Negroes from jury service" (Norris v. Alabama, 294 U. S. 587, 79 L. Ed. 1074). There is a presumption that officers in charge of jury selection have performed their duty fairly and justly (Tarrance v. Florida, [fol. 310] 188 U. S. 519, 47 L. Ed. 572, 116 So. 470 (Fla.), Certiorari denied in 278 U. S. 599, 73 L. Ed. 525) and without discrimination against race or class. The burden of proof is upon Petitioner to show an alleged discrimination in the selection of a grand or petit jury (Akins v. Texas, 325 U. S. 398, 89 L. Ed. 1692; Murray v. Louisiana, 163 U. S. 101, 41 L. Ed. 87).

In Akins v. Texas, 325 U. S. 398, 89 L. Ed. 1692, the Court uses the words "purposeful discrimination." In Norris v. Alabama, 294 U. S. 587, 79 L. Ed. 1074, the Court uses the words "long-continued, unvarying, and wholesale exclusion of Negroes from jury service."

It is very generally held that the burden of proof is on the Petitioner or Petitioners to show an alleged discrimination in the selection of a grand or petit jury.

Akins v. Texas, 325 U. S. 398, 89 L. Ed. 1692;

Murray v. Louisiana, 163 U. S. 101, 41 L. Ed. 87.

There is a presumption that officers in charge of the selection and summoning of a jury or jury panel will be presumed to have performed their duty fairly and justly without discrimination against any race or class. In other



words, discrimination in the selection of a jury will not be presumed.

*Tarrance v. Florida*, 188 U. S. 519, 47 L. Ed. 572, 116 So. 470 (Fla.) (Certiorari denied in 278 U. S. 599, 73 L. Ed. 525.)

Fairness in selection has never been held to require proportional representation of races upon a jury.

*Akins v. Texas*, 325 U. S. 398, 89 L. Ed. 1692;

*Virginia v. Rives*, 100 U. S. 313, 25 L. Ed. 667;

*Thomas v. Texas*, 212 U. S. 278, 53 L. Ed. 512.

A Petitioner has no constitutional right to be indicted or tried by any particular jury or by a jury composed in part of members of his race or class.

[fol. 311] *State v. Peoples*, 131 N. C. 784, 42 S. E. 814;

*State v. Sloan*, 97 N. C. 499;

*State v. Logan*, 341 Mo. 1164, 111 S. W. (2d) 1102 (1937);

*Martin v. Texas*, 200 U. S. 316, 50 L. Ed. 494.

"It is unsafe, we think, to attach too much significance to abstract, mathematical ratios or to the so-called law of recurrences in determining whether there has been arbitrary discrimination in the selection of juries."

*Swain v. State*, 215 Ind. 259, 18 N. E. (2d) 921, 926.

The State contends, therefore, that the Petitioner has not met the burden imposed upon them and as required by the principles stated in the case of *Faye v. New York*, 322 U. S. 261, 91 L. Ed. 2043, where this Court said:

"It is fundamental in questioning the composition of a jury that a mere showing that a class was not represented in a particular jury is not enough; there must be a clear showing that its absence was caused by discrimination, and in nearly all cases it has been shown to have persisted over many years. *Virginia v. Rives*, 100 U. S. 313, 322, 323 L. Ed. 667, 670, 671; *Martin v. Texas*, 200 U. S. 316, 320, 321, 50 L. Ed. 497, 498, 499, 26 S. Ct. 338; *Thomas v. Texas*, 212 U. S. 278, 282, 53 L. Ed. 512, 513, 29 S. Ct. 393; *Smith v. Texas*, 311 U. S.

128, 85 L. Ed. 84, 61 S. Ct. 164; *Hill v. Texas*, 316 U. S. 400, 86 L. Ed. 1559, 62 S. Ct. 1159; *Akins v. Texas* 325 U. S. 398, 89 L. Ed. 1692, 65 S. Ct. 1276, *supra*. Also, when discrimination of an unconstitutional kind is alleged, the burden of proving it purposeful and intentional is on the defendant: *Tarrance v. Florida*, 188 U. S. 519, 47 L. Ed. 572, 23 S. Ct. 402; *Martin v. Texas*, 200 U. S. 316, 50 L. Ed. 497, 26 S. Ct. 338; *Norris v. Alabama*, 294 U. S. 587, 79 L. Ed. 1074, 55 S. Ct. 579; *Snowden v. Hughes*, 321 U. S. 1, 8, 9, 88 L. Ed. 497, 502, 503, 64 S. Ct. 397; *Akins v. Texas*, 325 U. S. 398, 400, 89 L. Ed. 1692, 1694, 65 S. Ct. 1276."

Under the North Carolina practice, the questions raised by the Petitioner's motion to ~~quash~~ are in the first instance [fol. 312] heard and decided by the trial Court. The trial Court makes findings of fact; and in the absence of an abuse of discretion or in the absence of lack of evidence to support findings, such decision of the trial Court is ordinarily binding upon the Supreme Court of North Carolina. This practice is illustrated by the following cases:

- State v. Speller*, 229 N. C. 67, 47 S. E. (2d) 537;
- State v. Kirksey*, 227 N. C. 445, 42 S. E. (2d) 613;
- State v. Lord*, 225 N. C. 354, 34 S. E. (2d) 205;
- State v. Henderson*, 216 N. C. 99, 3 S. E. (2d) 57;
- State v. Bell*, 212 N. C. 20, 192 S. E. 852;
- State v. Walls*, 211 N. C. 487 (Certiorari denied 302 U. S. 635, 58 S. Ct. 18, 82 L. Ed. 494), 191 S. E. 232;
- State v. Cooper*, 205 N. C. 657, 172 S. E. 199;
- State v. Peoples*, 131 N. C. 784, 42 S. E. 814;
- State v. Daniels*, 134 N. C. 641, 46 S. E. 743.

While it is recognized by the State that on a question of this kind, the findings of the trial Court are not final, nevertheless, great weight is to be accorded the trial Court's decision because such Court make the initial investigation and has a greater opportunity to investigate the facts.

*Thomas v. Texas*, 212 U. S. 278, 53 L. Ed. 512;

*Akins v. Texas*, 325 U. S. 398, 89 L. Ed. 1692.

## II

Petitioner Has Not Shown That the North Carolina Statute for the Selection of Grand Jurors is in Itself Unconstitutional.

The Petitioner's whole argument in the Supreme Court of North Carolina, as will be seen from his brief filed before that Court, was to the effect that the Board of Commissioners of Forsyth County only resorted to the tax lists to secure the names of jurors but did not resort to "a list of names of persons who do not appear upon the tax lists, who are residents of the county and over twenty-one years of [fol. 313] age." In other words, the Petitioner's argument was, in effect, that had the Commissioners secured other lists of names, there would have been more colored people appearing on the jury list. This, of course, he does not substantiate in any way by showing that there were any eligible Negroes whose names did not appear on the tax lists. The Supreme Court of North Carolina construed the statute and decided that the resort to the lists of names outside of the tax lists was directory only.

State v. Brown, 233 N. C. 202, 63 S. E. (2d) 99.

The State of North Carolina had a right to construe its own statute and to decide what was the correct interpretation of the same.

Buchalter v. New York, 319 U. S. 427; 87 L. Ed. 1492;  
Howard v. Fleming, 191 U. S. 126; 48 L. Ed. 121;  
Howard v. Kentucky, 200 U. S. 164; 50 L. Ed. 421;  
Twining v. New Jersey, 211 U. S. 78; 53 L. Ed. 97;  
Snyder v. Massachusetts, 291 U. S. 97; 78 L. Ed. 674;  
Chaplinsky v. New Hampshire, 315 U. S. 568, 574;  
86 L. Ed. 1031, 1036.

We wish to call the attention of the Court to Stipulation of Counsel which appears on R. p. 24 which relates the facts as to the number of Negroes appearing among the regular jurors called for the trial panel and the number of Negroes appearing among the special veniremen called for the trial panel. It will also be seen from the addendum to the record which has been certified to this Court that one Negro was

tendered to the Petitioner as a trial juror, and the Petitioner refused to accept him.

[fol. 314]

### III

The Petitioner's Constitutional Rights Were Not Violated by the Admission of His Confession in Evidence.

First of all, it should be made clear to the Court that the Petitioner himself, by his own evidence, explicitly states that he was not ill treated, that he received all of the elementary needs of life, such as food and water, and that no coercion was used against him. On R. pp. 122 and 123, the Petitioner testified as follows:

"Q. Clyde, let me ask you a question. From the time you were put in custody on the 19th of June, up until after Mr. Price was employed, came over there to the jail to see you, after you made all the statements you made in this case, were you ever mistreated in any manner by these officers, any of the officers?

"A. No.

"Q. Was any violence used or threatened to be used against you?

"A. No sir.

"Q. Did anybody hit you or threaten to hit you?

"A. No sir.

"Q. Did anybody threaten to do you any physical injury of any kind?

"A. No sir.

"Q. Did anybody offer you any reward or hope of reward to make any statement?

"A. No sir.

"Q. Did anybody tell you that you'd get out lighter, they'd try to help you get out lighter if you'd make a statement?

"A. No.

"Q. And were you, at different times—at least on two occasions, I believe you said—warned that you did not have to make a statement?

[fol. 315] "A. Yes sir.

"Q. You were warned at least once before you made this final statement? Is that correct?



"A. Yes sir.

"Q. At that time you were told that any statement which you might make would be used against you?

"A. Yes sir."

We think it is clear that the officers had a right to arrest the Petitioner without warrants and to hold him for investigation, and as authority for this position, we call the attention of the Court to the following North Carolina statutes:

"§ 15-41. *When officer may arrest without warrant.*—

Every sheriff, coroner, constable, officer of police, or other officer, entrusted with the care and preservation of the public peace, who shall know or have reasonable ground to believe that any felony has been committed, or that any dangerous wound has been given, and shall have reasonable ground to believe that any particular person is guilty, and shall apprehend that such person may escape, if not immediately arrested, shall arrest him without warrant, and may summon all bystanders to aid in such arrest."

"§ 15-42. *Sheriffs and deputies granted power to arrest felons anywhere in state.*—When a felony is committed in any county in this State, and upon the commission of the felony, the person or persons charged therewith flees or flee the county, the sheriff of the county in which the crime was committed, and/or his bonded deputy or deputies, either with or without process, is hereby given authority to pursue the person or persons so charged, whether in sight or not, and apprehend and arrest him or them anywhere in the State."

"§ 15-46. *Procedure on arrest without warrant.*—Every person arrested without warrant shall be either immediately taken before some magistrate having jurisdiction to issue a warrant in the case, or else committed to the county prison, and, as soon as may be, taken before such magistrate, who, on proper proof, [fol. 316] shall issue a warrant and thereon proceed to act as may be required by law."

"§ 15-47. *Arresting officer to inform offender of charge, allow bail except in capital cases, and permit*

*communication with counsel or friends.*—Upon the arrest, detention, or deprivation of the liberties of any person by an officer in this state, with or without warrant, it shall be the duty of the officer making the arrest to immediately inform the person arrested of the charge against him, and it shall further be the duty of the officer making said arrest, except in capital cases, to have bail fixed in a reasonable sum, and the person so arrested shall be permitted to give bail bond, and it shall be the duty of the officer making the arrest to permit the person so arrested to communicate with counsel and friends immediately, and the right of such persons to communicate with counsel and friends shall not be denied.

“Any officer who shall violate the provisions of this section shall be guilty of a misdemeanor and shall be fined or imprisoned, or both, in the discretion of the court.”

The last above-quoted statute (§ 15-47) has been construed by the Supreme Court of North Carolina in the case of *State v. Exum*, 213 N. C. 16, 195 S. E. 7, wherein the Court said:

“The evidence at the trial shows that immediately after his arrest, the defendant was informed by the sheriff that he was charged with the murder of James Williams. This is a capital case. For this reason the provisions of the statute with respect to bail are not applicable to this case.

“There is no evidence in the record tending to show that after his arrest and while he was in the custody of the sheriff the defendant demanded of the sheriff that he be permitted to communicate with friends or with counsel. For this reason the provisions of the statute with respect to the right of a defendant in the custody of an officer and charged with the commission of a crime, to communicate with friends and counsel are not applicable to this case.”

[fol. 317] “Conceding, however, that the sheriff had violated the provisions of the statute, in the instant case, it would not follow that a voluntary confession

made by the defendant to the sheriff would be inadmissible as evidence because of such violation. It is not so provided in the statute."

The mere detention and questioning of a suspect is not prohibited either at common law or under the due process clause.

Lyons v. Oklahoma, 322 U. S. 596, 88 L. ed. 1481;

Lisenba v. California, 314 U. S. 219, 239-241, 86 L. ed. 166, 181, 182.

Even if it should be considered that the detention of the Petitioner was illegal, this does not necessarily become decisive on the question of the voluntariness of Petitioner's confession; and if it should be decided that Petitioner was detained contrary to law, this does not, of itself, decide the issue in Petitioner's favor.

Lisenba v. California, 314 U. S. 219, 86 L. ed. 166, 179.

All of the cases cited and relied upon by Petitioner either show long continued questioning in relays by officers, brutal treatment, threats or combinations of these factors, plus illegal detention. We briefly survey these cases.

Hailey v. Ohio, 332 U. S. 596, 92 L. ed. 224: The petitioner, a boy of fifteen years old, was questioned for five hours by police in relays by one or two each. He was shown an alleged confession of his co-defendants. A lawyer tried to see him twice but was refused admission by police. His mother testified that his clothes were torn and bloodstained.

Malinski v. New York, 324 U. S. 401, 89 L. ed. 1029: Malinski was not allowed to see his attorney although he asked for him. Malinski was held in a hotel room from 8:00 o'clock A. M. to 6:00 P. M., then held in a hotel for that night and for the next three days. He was questioned at various times and made various confessions. There is no comparison in the facts in the Malinski case and in the present case.

Ashcraft v. Tennessee, 322 U. S. 143, 88 L. ed. 1192: The petitioner was subjected to a thirty-six-hour period of practically continuous questioning, seated under powerful electric lights. This questioning was done by relays of

officers and experienced investigators. There is no comparison in this case to the facts now before the Court.

*Lyons v. Oklahoma*, 322 U. S. 596, 88 L. ed. 1481: Here the petitioner had made a confession which was admittedly involuntary and illegal. He afterwards made another confession, which it was contended was voluntary. The primary question considered in the opinion was the effect of the first confession on the second confession.

*McNabb v. U. S.*, 318 U. S. 332, 87 L. ed. 819: The petitioner in this case was questioned by numerous officers over a period of two days. This case came from a lower Federal Court, and no constitutional issue was decided. The case is not an authority in evaluating the constitutionality of confessions used in State Courts.

*Wax v. Texas*, 316 U. S. 547, 86 L. ed. 1663: Here the petitioner was arrested without a warrant by a sheriff from another county; he was removed to a county more than one hundred miles away and for three days was driven about from county to county and questioned continuously by various officers who told him of threats of mob violence, and there was little probability of such event. The sheriff testified that he saw evidence of cigarette burns on the petitioner's body.

*Lisenba v. California*, 314 U. S. 219, 86 L. ed. 166: The petitioner in this case was held incommunicado for a long period of time, was refused counsel and questioned from Sunday night until Tuesday morning. The petitioner made two confessions, one of which was not admitted, but the second one was ruled to be valid.

*White v. Texas*, 310 U. S. 530, 84 L. ed. 1342: Here the petitioner, an illiterate farm hand, was held in jail for several days without counsel and out of touch with friends. For several nights, he was taken, handcuffed, by armed officers into the woods for interrogation. In jail, the petitioner [fol. 319] was placed by himself, where the sheriff kept watching the petitioner and talking to him. A confession was obtained after questioning by the county attorney from 11:00 P. M. to 3:30 A. M. the next morning. During this period, the officers who had taken him to the woods were in and out of the room.

*Chambers v. Florida*, 309 U. S. 227, 84 L. ed. 716: Here



a group of young Negroes were arrested and held in jail without formal charges. They were not permitted to see counsel or friends, and believing that they were in danger of mob violence, made confessions at the end of an all-night session, following five days of questioning, each by himself, by State officers and other white citizens and in the presence of from four to ten white men, and after a previous confession had been pronounced "unfit" by the prosecuting attorney.

*Brown v. Mississippi*, 297 U. S. 278, 80 L. ed. 682: In this case, there was undenied brutality, such as whipping the petitioner, hanging and then taking him down, and his body showed marks of other brutal treatment.

*Wan v. U. S.*, 266 U. S. 1, 69 L. ed. 131: In this case, the petitioner was subjected to continuous examination for seven days by police officers, and which examination on one occasion continued throughout the night. The petitioner was sick and in pain, and the medical examiner testified that the petitioner would have confessed in order to secure relief. This was a Federal case.

*Watts v. Indiana*, 338 U. S. 49, 69 S. Ct. 1347: The petitioner Watts had been held for six days, during which time, except for Sunday, he was questioned by relays of officers from 5:30 or 6:00 P.M. until 2:00 or 3:00 A.M. He was not taken before a magistrate, as required by Indiana law, and was not advised of his constitutional rights.

*Turner v. Penna.*, 338 U. S. 62, 69 S. Ct. 1352: Turner was questioned by relays of officers from four to six hours a day for five days. He was not permitted to see friends or relatives and was not informed of his right to remain silent.

*Harris v. South Carolina*, 338 U. S. 68, 69 S. Ct. 1354: Harris was held in jail for several days, during which time [fol. 320] he was questioned, and on one night, five officers worked in relays. On the next night, the questioning continued under the same conditions from 1:30 in the afternoon until past one the following morning; and on Wednesday

afternoon, the Chief of the State Constabulary, with a half-dozen of his men, questioned Harris for an hour, and the local officers then questioned Harris for three and one-half hours longer. The sheriff then threatened to arrest petitioner's mother for having stolen property, and petitioner confessed.

The Petitioner quotes from the next to the last paragraph in the opinion in *Ward v. Texas*, 316 U. S. 547, 86 L. ed. 1663, in which the Court lays down a series of factors or tests and states that any one of the grounds would be sufficient cause for reversal. *The Court will see from an examination of the cases cited in the note to support this proposition that there were always combinations of brutality or persistent questioning plus, in some cases, illegal detention or threats of mob violence. The point is that in each of the cases cited to uphold the paragraph, the facts reveal combinations of these situations, and the cases are not decided on any one single point.* The cases of *Canty v. Alabama*, 309 U. S. 629, 84 L. ed. 988; *Lomax v. Texas*, 313 U. S. 544, 85 L. ed. 1511; and *Vernon v. Alabama*, 313 U. S. 547, 85 L. ed. 513, were disposed of by *per curiam* opinions, and no recitals of the facts are given.

We say, therefore, that where the findings of the State Court are supported by substantial evidence, the same should be upheld, and, in fact, as determined by the cases of *Lisenba v. California*, *supra*, and *Lyons v. Oklahoma*, *supra*, the same are final unless unconstitutionality is shown by admitted facts.

## Conclusion

The Respondent, State of North Carolina, therefore, contends that the Petitioner has not brought himself within the rulings of this Court which allow his case to be considered upon application for *certiorari* because of the alleged constitutional questions asserted by him.

[fol. 321] Respectfully submitted, Harry McMullan,  
Attorney General; Ralph Moody, Assistant Attorney  
General, Counsel for the State of North Carolina, Respondent.

[fol. 322]

## Appendix

### *Chapter 9, General Statutes of North Carolina—Jury*

Section 9-1. The board of county commissioners for the several counties, at their regular meetings on the first Monday in June in the year 1947, or the jury commissions or such other legally constituted body as may in the respective counties be charged by law with the duty of drawing names of persons for jury service, at the times of their regular meetings, and every two years thereafter, shall cause their clerks to lay before them the tax returns for the preceding year for their county, and a list of names of persons who do not appear upon the tax lists, who are residents of the county and over twenty-one years of age, from which lists the board of county commissioners or such jury commissions shall select the names of such persons who reside in the county who are of good moral character and have sufficient intelligence to serve as members of grand and petit juries. A list of the names thus selected by the board of county commissioners or such jury commissions shall be made out by the clerk of the board of county commissioners or such jury commissions and shall constitute the jury list of the county and shall be preserved as such.

The clerk of the board of county commissioners or such jury commissions, in making out the list of names to be laid before the board of county commissioners or such jury commissions, may secure said lists from such sources of information as deemed reliable which will provide the names of persons of the county above twenty-one years of age

residing within the county qualified for jury duty. There shall be excluded from said lists all those persons who have been convicted of any crime involving moral turpitude or who have been adjudged to be non compos mentis.

Section 9-2. *Names on list put in box.*—The commissioners at their regular meeting on the first Monday in July in the year nineteen hundred and five, and every two years thereafter shall cause the names on their jury list to be copied on small scrolls of paper of equal size and put into [fol. 323] a box procured for that purpose, which must have two divisions marked No. 1 and No. 2, respectively, and two locks, the key of one to be kept by the sheriff of the county, the other by the chairman of the board of commissioners, and the box by the clerk of the board.

Section 9-3. *Manner of drawing panel for term from box.*—At least twenty days before each regular or special term of the superior court, the board of commissioners of the county shall cause to be drawn from the jury box out of the partition marked No. 1, by a child not more than ten years of age, thirty-six scrolls except when the term of court is for the trial of civil cases exclusively, when they need not draw more than twenty-four scrolls. The persons whose names are inscribed on said scrolls shall serve as jurors at the term of the superior court to be held for the county ensuing such drawing, and for which they are drawn. The scrolls so drawn to make the jury shall be put into the partition marked No. 2. The said commissioners shall at the same time and in the same manner draw the names of eighteen persons who shall be summoned to appear and serve during the second week, and a like number for each succeeding week of the term of said court, unless the judge thereof shall sooner discharge all jurors from further service. The said commissioners may, at the same time and in the same manner, draw the names of eighteen other persons, who shall serve as petit jurors for the week for which they are drawn and summoned. The trial jury which has served during each week shall be discharged by the judge at the close of said week, unless the said jury shall be then actually engaged in the trial of a case, and then they shall not be discharged until the trial is determined.

Section 9-6. *Jurors having suits pending.*—If any of the jurors drawn have a suit pending and at issue in the supe-



rior court, the scrolls with their names must be returned into partition No. 1 of the jury box.

[fol. 324] Section 9-7. *Disqualified persons drawn.*—If any of the persons drawn to serve as jurors are dead, removed out of the county, or otherwise disqualified to serve as jurors, the scrolls with the names of such persons must be destroyed, and in such cases other persons shall be drawn in their stead.

Section 9-8. *How drawing to continue.*—The drawing out of partition marked No. 1 and putting the scrolls drawn into partition No. 2 shall continue until all the scrolls in partition No. 1 are drawn out, when all the scrolls shall be returned into partition No. 1 and drawn out again as herein directed.

Section 9-29. *Special venire to sheriff in capital cases.*—When a judge of the superior court deems it necessary to a fair and impartial trial of any person charged with a capital offense, he may issue to the sheriff of the county in which the trial may be a special writ of venire facias, commanding him to summon such number of persons qualified to act as jurors in said county as the judge may deem sufficient (such number being designated in the writ), to appear on some specified day of the term as jurors of said court; and the sheriff shall forthwith execute the writ and return it to the clerk of the court on the day when it is returnable, with the names of the jurors summoned.

Section 9-30. *Drawn from jury box in court by judge's order.*—When a judge deems a special venire necessary, he may, at his discretion, issue an order to the clerk of the board of commissioners for the county, commanding him to bring into open court forthwith the jury boxes of the county and he shall cause the number of scrolls as designated by him to be drawn from box number one by a child under ten years of age. The names so drawn shall constitute the special venire, and the clerk of the superior court shall insert their names in the writ of venire, and deliver the same to the sheriff of the county, and the persons named in the writ and no others shall be summoned by the sheriff. If the special venire is exhausted before the jury is chosen, the [fol. 325] judge shall order another special venire until the jury has been chosen. The scrolls containing the names of the persons drawn as jurors from box number one shall,

after the jury is chosen, be placed in box number two, and if box number one is exhausted before the jury is chosen, the drawing shall be completed from box number two after the same has been well shaken.

§ 14-21. *Punishment for rape.*—Every person who is convicted of ravishing and carnally knowing any female of the age of twelve years or more by force and against her will, or who is convicted of unlawfully and carnally knowing and abusing any female child under the age of twelve years, shall suffer death.

[fol. 326] [File endorsement omitted]

EXHIBIT 3 TO ANSWER—Filed July 5, 1951

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1950

No. 488, Misc. —

CLYDE BROWN, Petitioner

vs.

STATE OF NORTH CAROLINA

On petition for writ of Certiorari to the Supreme Court of the State of North Carolina.

On consideration of the petition for a writ of certiorari herein to the Supreme Court of the State of North Carolina. It is ordered by this Court that the said petition be, and the same is hereby, denied.

May 28, 1951.

Mr. Justice Black and Mr. Justice Douglas are of the opinion that certiorari should be granted.

A true copy. Test:

Charles Elmore Cropley, Clerk of the Supreme Court of the United States, by Hugh W. Barr, Deputy.

[fol. 327]. IN UNITED STATES DISTRICT COURT

[Title omitted]

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed July 19,  
1951

## FINDINGS OF FACT

Upon the petition, the answer thereto, and the exhibits filed by the respondent, the Court finds these facts:

1. On the 2nd day of July, 1951, the petitioner filed in this Court a petition for a writ of habeas corpus alleging that he is being unjustly and unlawfully held in custody by the respondent by virtue of a judgment and sentence of death imposed upon him by the Superior Court of North Carolina sitting in Forsyth County, and praying that he be relieved of such unlawful detention, imprisonment and sentence of death; upon filing of the petition an order was entered requiring respondent to show cause on July 5, 1951, why such writ should not issue, and on the return date respondent appeared through counsel and filed an answer denying that the detention of petitioner was unlawful and praying that the writ be denied on the face of the record itself. In support of his prayer that the writ be denied and the petition dismissed, the respondent, without objection, introduced the following exhibits: No. 1. Record on Appeal to the Supreme Court of North Carolina; No. 2. Petition to Supreme Court of the United States; No. 3. Attested Copy of Order Denying the Petition; No. 4. Addendum to Record in the Supreme Court of North Carolina; No. 5. Defendant's Brief Before the Supreme Court of North Carolina; No. 6. State's Brief Before the Supreme [fol. 328] Court of North Carolina; No. 7. State's Brief Opposing Petition for Writ of Certiorari; No. 8. Official Advance Sheets Reporting Decision of Supreme Court of North Carolina.

2. At September Term, 1950, of the Superior Court sitting in Forsyth County, the petitioner was indicted by a grand jury drawn from the body of that County for the crime of rape, and, in accordance with the North Carolina statutes and the practice in the Courts of that State, a special venire was drawn from the regular jury boxes of the

County to appear on the 12th day of September, 1950, as a panel from which the trial jury might be selected.

3. Before the selection of the jury, and before pleading to the bill of indictment, the petitioner through his counsel, Mr. Hosea Price of the Forsyth County Bar, lodged motion to quash the indictment upon the ground that it "was drawn with a view to and purpose in mind of systematically limiting representation thereon of negroes or persons of African descent" and "in a manner which violates the Constitutional rights of this defendant". Thereupon, the trial Judge proceeded to hear evidence on the motion and the petitioner was afforded a full and fair opportunity to offer such evidence as he desired; the evidence in support and opposition to the motion is fully stated in the Record on Appeal to the Supreme Court, beginning on page 22 and ending on page 49; after a full and impartial hearing the trial Judge concluded that the petitioner had not sustained the motion, and it was denied. The Court found the facts specifically, and the findings and conclusions of law are set out in the Record on Appeal to the Supreme Court of North Carolina, beginning on page 49 and ending on page 52. The petitioner excepted to the order.

4. Thereupon, a trial jury was selected according to [fol. 329] North Carolina law and practice from the special venire theretofore drawn from the jury boxes, and the jury found the petitioner guilty of rape as charged without recommendation of mercy, as permitted by the North Carolina law, and petitioner excepted.

5. When judgment upon the verdict was prayed by the State, the petitioner moved in arrest, alleging for the first time the additional ground in support of the earlier motion to quash "that the jury commissioners did not prepare and hand over to the Clerk of the County Commissioners a list of other qualified citizens whose names do not appear on the tax lists as required by General Statute 9, subsection 1". This motion was overruled and petitioner excepted.

6. Upon the verdict the Court sentenced the petitioner to death, as required by the North Carolina statute.

7. During the trial the State offered to put in evidence an alleged statement made by the petitioner, containing



certain damaging admissions, and upon objection entered the Court in the absence of the jury and, in accord with North Carolina law and practice, heard evidence to determine whether such alleged statements were voluntary; after a full hearing, during which petitioner was afforded a fair opportunity to present such evidence as he desired and after argument the Court concluded that the statements were voluntarily made and admitted them for the consideration of the jury. The petitioner excepted. The evidence bearing on this question, together with the Court's finding, are set out in the Record on Appeal to the Supreme Court of North Carolina, beginning at page 94 and ending on page 133.

8. From the judgment the petitioner, with permission of the Court, appealed in forma pauperis to the Supreme Court of North Carolina, assigning, among others not here pertinent, errors as follows: "No. 1. The Court erred in overruling the defendant's motion to quash the bill of indictment against the defendant . . ." and "No. 3. The Court erred in its ruling that the statements made by the defendant which purported to be a confession were freely and voluntarily given, and that same was competent evidence . . ."

9. The Supreme Court of North Carolina, at its Fall Term, 1950, affirmed the judgment of the Superior Court (233 N. C., page 202), stating: "A person accused of crime is entitled to have the charges against him performed by a jury in the selection of which there has been neither inclusion nor exclusion because of race. This the defendant has had in both the grand and petit juries which performed in the case, or, at least, the contrary in respect to neither has been made to appear on the record. Hence, his claim of jury defect or irregularity is unavailing". In the opinion it is also stated with respect to the assignment of error in admitting the confession: "The only basis of challenge to the competency of defendant's confession is that he was under arrest, being held without warrant, and was in custody at the time it was given. These circumstances, taken singly or all together, unless they amounted to coercion, were not sufficient in and of themselves to render a confession, otherwise voluntary, involuntary as a matter of law and incompetent as evidence. After a

preliminary investigation, pursuant to the procedure outlined in *State v. Whitener*, 191 N. C., p. 659, the trial Court ruled the confession to be voluntary, and permitted the Solicitor to offer it in evidence against the prisoner. The ruling is fully supported by the evidence. . . . The contentions of error in its admission are without force or substance".

10. Following the decision of the Supreme Court of North Carolina, affirming the judgment of the trial Court, the petitioner filed petition in the Supreme Court of the United States for writ of certiorari, alleging "violation [fol. 331] of the rights of the defendant as guaranteed him under the fifth and fourteenth amendment to the Constitution of the United States, in that members of said grand jury were selected and drawn with a view and purpose of systematically limiting the representation thereon of persons of the negro race . . . with the result that petitioner and members of his race are unlawfully discriminated against"; and that "the State was allowed to introduce into evidence statements of petitioner in the nature of confessions of the alleged crime". On May 28, 1951, this petition was denied with the notation: "Mr. Justice Black and Mr. Justice Douglas are of the opinion that certiorari should be granted".

11. Petitioner is a member of the negro race.

12. The facts found by the trial Judge, in respect to the composition of the grand jury, are supported by the evidence before him, and these findings and the conclusion thereon are adopted as findings in this respect, and the facts found by that Court in respect to the question of admission of statements made by the defendant are also supported by the evidence, and these findings and the conclusions thereon are likewise adopted.

13. The petitioner was represented by experienced and capable counsel at every stage of the proceedings in the State Courts, and petitioner and his counsel were given full and fair opportunities to present evidence and argument with respect to the two alleged violations of his Constitutional rights, which were there raised and adjudicated and which he now attempts to raise again.

14. The remedies provided by the law of North Carolina

through resort to its Courts afforded to petitioner a full and fair adjudication of the federal questions now raised.

[fol. 332]

### Conclusions of Law

Upon these facts, the Court concludes:

1. That the record and findings thereon present no unusual situation, and a respectful consideration for the action of the North Carolina Courts and the denial of certiorari by the Supreme Court of the United States requires that the petition for writ of habeas corpus be denied and that the petition be dismissed.

2. That the stay of execution under the judgment against the petitioner in the State Court should be vacated.

July 19th, 1951.

Don Gilliam, United States District Judge.

[fol. 333]

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT  
OF NORTH CAROLINA

[Title omitted]

MEMORANDUM OPINION—Filed July 19, 1951

The petitioner was convicted of the capital offense of rape in the Superior Court of North Carolina, sitting in Forsyth County, and thereupon sentenced to death as provided by the North Carolina statute. Before pleading to the indictment the petitioner moved to quash upon the ground that there had been systematic and arbitrary exclusion of negroes solely on account of race. The Court heard evidence from the petitioner and afforded him and his counsel full and fair opportunity to substantiate the contention. Upon such evidence the trial Court ruled against petitioner and denied the motion. The evidence and conclusion of the trial Court are in the record.

During the trial alleged statements of petitioner were offered by the State and objected to by petitioner on the

3

ground that such statements were involuntary and, therefore, incompetent.

Following the North Carolina law and practice in its Courts, the jury was excused, petitioner's counsel was permitted to cross-examine the witnesses to whom the statements were made, petitioner gave his version of the conditions under which the statements were made, and petitioner was allowed full opportunity to present such evidence as he wished in this respect. The Court ruled that the statements were voluntarily made, overruled the objection, and the statements were admitted for the jury's consideration. The evidence and the conclusion of the trial Judge are in the record.

[fol. 334] Upon appeal to the Supreme Court of North Carolina, the petitioner assigned as errors both the ruling of the trial Court in overruling the motion to quash the indictment and the admission of the confessions as evidence. The Supreme Court of North Carolina upheld the conviction and affirmed the judgment, saying in its opinion: "A person accused of crime is entitled to have the charges against him performed by a jury in the selection of which there has been neither inclusion nor exclusion because of race. This the defendant has had in both the grand and petit juries which performed in the case, or, at least, the contrary in respect to neither has been made to appear on the record. Hence, his claim of jury defect or irregularity is unavailing"; and "The only basis of challenge to the competency of defendant's confession is that he was under arrest, being held without warrant, and was in custody at the time it was given. These circumstances, taken singly or all together, unless they amounted to coercion, were not sufficient in and of themselves to render a confession, otherwise voluntary, involuntary as a matter of law and incompetent as evidence. After preliminary investigation, pursuant to the procedure outlined in *State v. Whitener*, 191 N. C. 659, the trial Court ruled the confession to be voluntary and permitted the Solicitor to offer it in evidence against the prisoner. The ruling is fully supported by the evidence. . . . The contentions of error in its admission are without force or substance."

A petition for writ of certiorari was then filed in the Supreme Court, assigning as ground the two alleged errors



presented to the Supreme Court of North Carolina, and on May 28, 1951 this petition was denied by an order containing this notation: "Mr. Justice Black and Mr. Justice Douglas are of the opinion that certiorari should be granted."

It is not asserted or even suggested by the petitioner that adequate remedies are not provided by North Carolina law [fol. 335] to correct the wrongs about which he now complains; in fact, it must be admitted that such remedies existed and that he and his counsel took full advantage of them. It cannot be maintained, in fact, it is not even alleged, that petitioner was in any way or to any extent limited or restricted in his resort to such remedies. No one, upon the record, would conclude that the action of the State Courts in deciding the questions now raised was indifferently or lightly considered. The decision in each instance was reached after painstaking and careful procedure in accordance with law and practice and only after petitioner had had his full say. The petitioner has had his day in Court and his present positions have been rejected by a Court which had and did not lose jurisdiction and on a record which seems to demonstrate that petitioner was given a fair and impartial trial, in which he was accorded all rights guaranteed to him by the federal Constitution and dictated by the principles of justice. In addition, the Supreme Court of the United States has refused to review such action of the State Court. The record does not present any unusual situation which would justify the issue of the writ and, therefore, the petition for such writ has been denied.

It would serve no good purpose to review the cases. Two cases decided by our Circuit Court of Appeals clearly support, it seems, the conclusion reached. These are: *Stonebreaker v. Smith*, 163 Fed. 2d 498, and *Jerry Adkins v. W. Frank Smith*, decided April 10, 1951. In the latter, quoting with approval from the former, the Court said: "We are confronted at the outset with the fact that the case presented by petitioner is precisely the same as that in which relief was denied by the Virginia Courts and in which certiorari was denied by the Supreme Court of the United States. The rights of petitioner were fully presented in that case and the Virginia Courts had full power to grant the relief asked, had they thought petitioner entitled to it. The facts [fol. 336] were fully before the Supreme Court of the United

States on certiorari and proper respect for that Court compels the conclusion that if it had thought that the record showed a denial of petitioner's constitutional rights, certiorari would have been granted and petitioner would have been afforded relief. While action of the Virginia Courts and the denial of certiorari by the Supreme Court were not binding on the principle of res judicata, they were matters entitled to respectful consideration by the court below; and in the absence of some most unusual situation, they were sufficient reason for that court to deny a further writ of habeas corpus. It would be intolerable that a federal district court should release a prisoner on habeas corpus after the state courts have refused him relief in precisely the same case on a similar writ and the United States Supreme Court has refused to review their action on certiorari. This would be, in effect, to permit a federal district court to review the Supreme Court of the United States as well as the highest court of the State."

There appears no semblance or reason for a departure from the general rule laid down in these two cases.

An order will be entered denying the petition for writ of habeas corpus and vacating the stay of execution of judgment in the State Court which was heretofore entered.

July 19th, 1951.

Don Gilliam, United States District Judge.

[fols. 337-337m-344] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT  
OF NORTH CAROLINA

[Title omitted]

ORDER DENYING PETITION—Filed July 19, 1951

The Court having concluded upon the petition, the answer thereto, and the exhibits filed by the respondent with his answer, that the writ of habeas corpus should not issue, and the Court having filed its findings of fact separately, together with its conclusions of law thereupon, it is now ordered and decreed that the petition for a writ of habeas

corpus be and the same is denied, the petition is dismissed, and the stay of execution of the judgment of the North Carolina Court heretofore issued is vacated.

It is also ordered that a certified copy of this order, under the seal of the Court, be served upon the respondent as his authority for further proceedings under the State Court judgment.

July 19th, 1951.

Don Gilliam, United States District Judge.

[fol. 345] UNITED STATES COURT OF APPEALS FOR THE FOURTH  
CIRCUIT

[Title omitted]

ORDER OF SUBSTITUTION—Filed October 13, 1951

[fol. 346] Counsel for the Appellee in the above case having informed the Court that the Appellee, J. P. Crawford, Warden of the Central Prison of the State of North Carolina, has resigned and ceases to hold said office, and that he has been succeeded by Robert A. Allen, as Warden of the said Central Prison of the State of North Carolina,

And it Appearing that assent has been duly given that said Robert A. Allen as Warden be substituted in lieu of said J. P. Crawford, resigned, It Is Ordered that Robert A. Allen, Warden of the Central Prison of the State of North Carolina, be, and he is hereby, substituted as party Appellee in the place and stead of the said J. P. Crawford.

October 13, 1951.

John J. Parker, Chief Judge, Fourth Circuit.

[fol. 347]

[File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE  
FOURTH CIRCUIT

No. 6331

RALEIGH SPELLER, Appellant,

versus

ROBERT A. ALLEN, Warden, Central Prison of the State of  
North Carolina, Raleigh, North Carolina, Appellee

No. 6332

CLYDE BROWN, Appellant,

versus

ROBERT A. ALLEN, Warden, Central Prison of the State of  
North Carolina, Raleigh, North Carolina, AppelleeAppeals from the United States District Court for the  
Eastern District of North Carolina, at Raleigh

(Argued October 12, 1951. Decided November 5, 1951)

[fol. 348] Before Parker, Soper and Dobie, Circuit Judges

Herman L. Taylor (C. J. Gates on Brief) for Appellant in  
No. 6331; Hosea V. Price (Herman L. Taylor on Brief)  
for Appellant in No. 6332; E. O. Brogden, Jr. Attorney  
for State Highway and Public Works Commission of  
North Carolina, for Appellee in No. 6331; R. Brookes  
Peters, Jr., General Counsel of State Highway & Public  
Works Commission of North Carolina, for Appellee in  
No. 6332; (Harry McMullan, Attorney General of North  
Carolina, on Briefs for Appellee in Nos. 6331 and 6332)

OPINION—Filed November 5, 1951

Per CURIAM:

These are appeals from denials of writs of habeas corpus  
in cases in which appellants have been convicted of capital



felonies and sentenced to death by North Carolina state courts. In both cases the questions raised in the petitions for habeas corpus had been raised and passed upon by the trial court, the action of the trial court had been affirmed by the Supreme Court of the state and the Supreme Court of the United States had denied certiorari.\* *State v. Speller*, 231 N. C. 549, 57 S. E. 2d 759, cert. denied *Speller v. North Carolina*, 340 U. S. 835; *State v. Brown*, 233 N. C. 202, 63 S. E. 2d 99, cert. denied *Brown v. Carolina*, 341 U. S. 943. In the *Speller* case the court below, after granting the writ [fol. 349] of habeas corpus and hearing evidence on the question presented and deciding that appellant's position was without merit, vacated the writ and dismissed the petition on the ground that upon the procedural history of the case the appellant was not entitled to the writ. In the *Brown* case the petition for the writ was denied without hearing, on the basis of its procedural history. We think that dismissal in both cases was clearly right. In view of the action of the state Supreme Court upon the identical questions presented to the court below and the denial of certiorari by the Supreme Court of the United States, the cases fall squarely within the rule that "a federal court will not ordinarily re-examine upon a writ of habeas corpus the questions thus adjudicated." *Ex Parte Hawk*, 321 U. S. 114, 64 S. Ct. 448, 450, 88 L. Ed. 572; *Darr v. Burford*, 339 U. S. 200, 70 S. Ct. 587, 94 L. Ed. 761; *Adkins v. Smyth*, 4 Cir. 188 F. 2d 452; *Goodwin v. Smyth*, 4 Cir., 181 F. 2d 498; *Stonebreaker v. Smyth*, 4 Cir., 163 F. 2d 498, 499. As said by this court in the case last cited:

"We are confronted at the outset with the fact that the case presented by petitioner is precisely the same as that in which relief was denied by the Virginia courts and in which certiorari was denied by the Supreme Court of the United States. The rights of petitioner were fully presented in that case and the Virginia courts had full power to grant the relief asked, had they

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\* Two prior convictions of *Speller* on the same charge had been reversed by the North Carolina Supreme Court because of discrimination against Negroes in the selection of juries. *State v. Speller*, 229 N. C. 67, 47 S. E. 2d 537; *State v. Speller*, 230 N. C. 345, 53 S. E. 2d 294.

thought petitioner entitled to it. The facts were fully before the Supreme Court of the United States on certiorari; and proper respect for that court compels the conclusion that if it had thought that the record showed a denial of petitioner's constitutional rights, certiorari would have been granted and petitioner would have been afforded relief. While action of the Virginia courts and the denial of certiorari by the Supreme Court were not binding on the principle of *res judicata*, [fol. 350] they were matters entitled to respectful consideration by the court below; and in the absence of some most unusual situation, they were sufficient reason for that court to deny a further writ of habeas corpus. It would be intolerable that a federal district court should release a prisoner on habeas corpus after the state courts have refused him relief in precisely the same case on a similar writ and the United States Supreme Court has refused to review their action on certiorari. This would be, in effect, to permit a federal district court to review the Supreme Court of the United States as well as the highest court of the state. The rule in such cases was stated in the case of *White v. Ragen*, 324 U. S. 760, 764, 765, 65 S. Ct. 978, 981, 89 L. Ed. 1348, relied on by the court below, as follows: 'If this Court denies certiorari after a state court decision on the merits, or if it reviews the case on the merits, a federal District Court will not usually re-examine on habeas corpus the questions thus adjudicated. *Ex parte Hawk, supra*, 321 U. S. 114, 118, 64 S. Ct. 448, 88 L. Ed. 572.'

'The citation of *Ex parte Hawk* shows what the court had in mind in the use of the words 'will not usually re-examine' in the statement just quoted; for the court had pointed out in that case the sort of cases in which the district court would be justified in granting habeas corpus notwithstanding the denial of certiorari in cases where the state court had refused to grant relief. These were cases where resort to state court remedies had failed to afford a full and fair adjudication of the federal contentions raised either because the state afforded no remedy or because the remedy af-

forded proved in practice unavailable or seriously inadequate."

Affirmed.

[fol. 351] IN UNITED STATES COURT OF APPEALS FOR THE  
FOURTH CIRCUIT

No. 6332

CLYDE BROWN, Appellant,

vs.

ROBERT A. ALLEN, Warden, Central Prison of the State of  
North Carolina, Raleigh, North Carolina, Appellee

Appeal from the United States District Court for the  
Eastern District of North Carolina

JUDGMENT—Filed and Entered November 5, 1951.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of North Carolina, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed with costs.

November 5th, 1951.

John J. Parker, Chief Judge, Fourth Circuit.

[fol. 352] Order Authorizing Clerk to Use Original Transcript of Record in Making Up Record for Use in the Supreme Court of the United States on Application for Writ of Certiorari (omitted in printing).

[fol. 353] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 354] SUPREME COURT OF THE UNITED STATES, OCTOBER  
TERM, 1951

No. 333, Misc.

CLYDE BROWN, Petitioner,

vs.

ROBERT A. ALLEN, Warden, Central Prison of the State of  
North Carolina

ORDER ALLOWING CERTIORARI—March 24, 1952

On petition for writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

On consideration of the motion for leave to proceed in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 670. The case is placed on the summary docket and assigned for argument immediately following No. 643; Speller vs. Allen, Warden.

It is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 355] SUPREME COURT OF THE UNITED STATES, OCTOBER  
TERM, 1951

No. 670

[Title omitted]

STIPULATION—April 9, 1952

It is stipulated by and between Counsel for Petitioner and Counsel for Respondent that the portion of the record in the appeal of the above entitled matter to be printed for



the hearing of this case on the merits shall consist of the following:

From Volume I of the Record in United States Court of Appeals for the Fourth Circuit:

I. Petition to District Court for Writ of Habeas Corpus	pp. 6-16
II. Answer to Petition for Writ of Habeas Corpus and the Following Exhibits which by Reference are made a part of the Answer	pp. 19-25
Exhibit #1 Record on Appeal to Supreme Court of N. C.	p. 44
Warrant	pp. 1-2
Judgment in Municipal Court	p. 3
Organization of Court and Drawing Grand Jury	pp. 3-4
Appointment of Counsel	pp. 5-6
Plea and Bill of Indictment	pp. 7-8
Order for Special Venire	p. 9
Minutes of Motion to Quash	pp. 9-10
Drawing of Jurors—Regular and Special	pp. 11-13
Order for Alternate Juror	p. 14
Minutes of Proceedings Sept. 14th and 15th	pp. 14-16
Defendant's Statement of Case on Appeal	pp. 21-22
Defendant's Evidence on Motion to Quash	pp. 22-39
State's Evidence on Motion to Quash	pp. 40-49
Order of Court on Motion to Quash	pp. 49-52
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State's Evidence continued	pp. 134-169	
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Judge's Charge	pp. 183-203	
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Exhibit #4 Addendum to Record (Stipu-		
lation)		p. 65
Exhibit #5 Defendant Appellant's Brief		p. 66
Questions Presented	pp. 1-2	
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Argument	I. Questioning Legality of Grand Jury, pp. 4-15	
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Exhibit #6 Brief for State		p. 67
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Argument: Motion to Quash	pp. 3-24	
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Exhibit #8 Opinion of the Supreme Court of N. C. S. v. Brown, 233 N. C. 202-208.		
Complete Opinion of the Court except for headnotes		p. 69
Exhibit #2 (a) Petition to Supreme Court of U. S. for Writ of Certiorari to Supreme Court of N. C.		pp. 49-53
(b) Brief in Support of Petition		pp. 54-63

Exhibit #7 Brief of State of N. C., Respondent, Opposing Petition for Writ of Certiorari

Statement of Case ..... p. 1  
 Facts ..... pp. 2-3  
 Argument I. Exclusion by reason of race, pp. 3-10

\* p. 68

II. Unconstitutionality of Grand Jury, pp. 10-11

III. Admissibility of Confession, pp. 12-18

Appendix, Chap. 9, General Statutes of N. C., Jury, pp. 20-23

G.S. 14-21, Punishment for Rape, p. 23

Exhibit #3 Order Denying Petition for Writ of Certiorari

p. 63

III. Findings of Fact and Conclusions of Law of District Court

pp. 30-35

IV. Memorandum Opinion of District Court

pp. 26-29

V. Order of District Court Denying Petition for Writ

p. 36

From Volume II of the Record in United States Court of Appeals for the Fourth Circuit:

VI. Proceedings in U. S. Court of Appeals Fourth Circuit

p. 6

VII. Order of Substitution of Robert A. Allen for J. P. Crawford as Respondent

pp. 6-7

VIII. Opinion of Circuit Court of Appeals "Brown v. Allen, Warden," (192 F. 2d 477)

pp. 8-11

\* The page numbers so designated are page numbers given exhibits incorporated by reference in respondent's answer to the petition to the District Court. These exhibits so designated are multi-page pamphlets and the page numbers which follow are references to the pages of each pamphlet.

IX. Judgment of Circuit Court of Appeals . . . . . p. 12

X. Order of John J. Parker, J. . . . . p. 13

This the 9th day of April, 1952

Herman L. Taylor, Counsel for Petitioner. Harry McMullan, Attorney General of North Carolina; Ralph Moody, Assistant Attorney General; R. Brooks Peters, Jr., General Counsel of State Highway & Public Works Commission; E. O. Brogden, Jr., Attorney for State Highway & Public Works Comm., Counsel for Robert A. Allen, Respondent.

(1323)



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SUPREME COURT, U.S.

## TRANSCRIPT OF RECORD

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Supreme Court of the United States

OCTOBER TERM, 1951

No. 643

\_\_\_\_\_  
RALPH SPELLER, PETITIONER,

vs.

ROBERT A. ALLEN, WARDEN, CENTRAL PRISON  
OF NORTH CAROLINA, RALEIGH, NORTH CARO-  
LINA

\_\_\_\_\_  
ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

---

PETITION FOR CERTIORARI FILED DECEMBER 31, 1951

CERTIORARI GRANTED MARCH 10, 1952

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 643

RALEIGH SPELLER PETITIONER,

vs.

ROBERT A. ALLEN, WARDEN, CENTRAL PRISON  
OF NORTH CAROLINA, RALEIGH, NORTH CARO-  
LINA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 17, 1952

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**IN UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF NORTH CAROLINA**

**RALEIGH SPELLER, Petitioner,**

vs.

**J. P. CRAWFORD, Warden, Central Prison of the State of  
North Carolina, Raleigh, North Carolina, Respondent**

**PETITION FOR WRIT OF HABEAS CORPUS—Filed October 28,  
1950**

To the District Court of the United States for the Eastern  
District of North Carolina:

The petitioner, Raleigh Speller, respectfully shows unto  
the Court:

1. That he is a citizen of the United States of America and  
of the State of North Carolina, and is a member of the Negro  
race.

2. That he is at the present time unjustly and unlawfully  
detained and imprisoned at the Central Prison of the State  
of North Carolina, in Raleigh, North Carolina, by virtue  
of a judgment and sentence of death by asphyxiation pro-  
nounced upon him by the Superior Court of Bertie County,  
North Carolina on the 5th day of September 1949, upon  
conviction of the crime of rape.

Petitioner avers that he is not guilty of the offense for  
which he was tried, convicted and is presently detained by  
the respondent in the death house of the Central Prison of  
the State of North Carolina awaiting the execution of sen-  
tence of death by asphyxiation on the 3rd day of November,  
1950, and that the said imprisonment, restraint, and sentence  
are illegal and void, in that during the trial of petitioner be-  
fore the Superior Court of Bertie County petitioner was  
denied equal protection of the laws, in violation of the  
Fourteenth Amendment to the United States Constitution.

3. That in order that this Court may fully appreciate the  
grounds for the instant petition, petitioner will set forth



herein the circumstances leading up to the instant petition [fol. 7] and then will set forth the specific respect in which he alleges his rights under the Fourteenth Amendment have been so violated as to render his conviction and the judgment and sentence passed thereupon null and void.

Your petitioner, Raleigh Speller, an illiterate and feeble-minded Negro of about 46 years of age, has been thrice tried and convicted in the Superior Court of Bertie County, North Carolina, of assaulting and raping a white woman named Mrs. Aubrey Davis, who was about 50 years of age. The crime was allegedly committed on the 18 day of July 1947, and an indictment by a grand jury of Bertie County at the August, 1947 term of the Bertie County Superior Court, and his subsequent trial and conviction were summarily reversed and set aside by the Supreme Court of North Carolina (*State vs. Raleigh Speller*, 229 N. C. 67, 47 S. E. (2d) 537) for denial by the trial Court of petitioner's motion to quash the bill of indictment against him and to set aside the array of petit juries, on the grounds of discriminatory exclusion of Negroes from a grand and petit juries in Bertie County. The petitioner was subsequently indicted at the August, 1948 Term of the Superior Court of Bertie County by a grand jury, two members of which were Negroes. When petitioner's case came on for trial upon the latter said indictment, at the November, 1948 Term of said Court, the trial judge finding that there were probable grounds to believe that a fair and impartial jury could not be obtained from Bertie County, ordered a special venire from Warren County, a County in the same Judicial District as Bertie County, to try said case. Petitioner thereafter timely moved that the entire array of special veniremen from Warren County be set aside, for that Negro citizens were, solely on account of race, arbitrarily and systematically discriminated against in the preparation of jury lists in Warren County. The trial judge denied the last motion, and on appeal of this cause for the second time to the Supreme Court of North Carolina, the latter Court again reversed the conviction and sentence of petitioner. (*State vs. Raleigh Speller*, 230 N. C. 345, 53 S. E. (2d) 294.) Thereafter, petitioner came on for trial a third time in the Superior Court of Bertie County, at the August, 1949 Term of said Court, upon the

same bill of indictment found at the August, 1948 term of said Court. Prior to said latter trial, the then presiding judge, upon motion of the petitioner that because of the notoriety of this case in and around Bertie County, an impartial jury could not be obtained therefrom, ordered a [fol. 8] special venire to be drawn from Vance County, a County in the same Judicial District as Bertie County, and the most remote County in said District, to try petitioner. Thereafter, the petitioner timely moved the Court to set aside the entire array of special veniremen called from Vance County, for that the jury commissioners of said County had, pursuant to a long and continuous practice, discriminated against Negroes in the selection of juries, solely on account of race and/or color. The trial judge denied the latter motion and the petitioner was subsequently convicted of the capital crime of rape, without recommendation of mercy, and the sentence imposed upon him was that of death by asphyxiation. On petitioner's appeal to the Supreme Court of North Carolina from this latter conviction and sentence, the same were upheld (231 N. C. 549, 57 S. E. (2d) 759).

The evidence adduced by the State during the three trials of petitioner hereinbefore referred to, tended to show that on Friday night, July 18, 1947, the prosecuting witness Mrs. Aubrey Davis, was preparing to retire around 10:30 p.m. Mr. Davis, her husband, who is deaf, had retired about a half an hour or forty-five minutes prior to that time. Glad in a night gown, stepins and a pair of slip-on shoes, Mrs. Davis went to the screen door at the end of her back hall, which opened on back porch, to see if it was locked. Finding the screen door unlocked, and the latch bent so that it would not hook, Mrs. Davis stepped out on the back porch to get a hammer which was lying on a table on the porch which she used to straighten the latch on the screen door. Stepping back out on the porch to put the hammer back on the table, Mrs. Davis was grabbed by someone whom she described to be a light-complexioned colored man, who suddenly dashed up on the porch from a hiding place in the shadows at the edge of her house. The man clinched Mrs. Davis in his embrace, dragged her from the porch out into the yard a few feet from the porch, and there assaulted her. Sometime

during the course of the assault the prosecutrix lost consciousness. Regaining consciousness after the lapse of an indefinite period of time, prosecutrix made an alarm to which neighbors and officers of the law responded. Thereafter, without any description from the prosecuting witness of how her assailant looked, other than her statement that he was a light-complexioned colored man, the police picked up the petitioner at a little roadside inn, located approximately 600 feet from the scene of the alleged crime, and within forty-five or fifty minutes after the commission of the [fol. 9] alleged crime, because the defendant, who had been drinking, was perspiring (in the month of July) and looked suspicious. Upon trial the petitioner was represented by the State to be the light-complexioned man who committed the alleged crime, and the jury upon this representation and the evidence introduced by the State, convicted petitioner of the crime with which he was charged.

During the first and third trials, petitioner introduced no evidence in his behalf, choosing rather to rely upon what he considered to be the weakness of the State's case and errors in law committed during the course of his trial. In the second trial, however, petitioner introduced evidence, through his own testimony, and that of five other disinterested witnesses, which tended to establish his presence at a place other than that at which the crime herein involved was allegedly committed, and at the time of its commission.

4. That upon the affirming by the Supreme Court of North Carolina of his third conviction and sentence by the Superior Court of Bertie County, petitioner applied to the Supreme Court of the United States for a writ of certiorari to review the decision of the Supreme Court of North Carolina. On the 9th day of October, 1950 the Supreme Court of the United States denied petitioner's application for said writ.

Petitioner now turns to the respect in which he claims that his conviction and the judgment and sentence passed thereupon are illegal, null and void.

Petitioner contends that he has been deprived of equal protection of the laws by the discriminatory and arbitrary exclusion of Negroes from petit juries in Vance County, whence come the jury that tried him, solely and wholly for reasons of race or color. Such being the case, petitioner

contends, therefore, that his conviction, judgment, and sentence are null and void, and that therefore, the imprisonment and restraint of petitioner, pursuant to said conviction, judgment and sentence, is illegal.

The rule that in the trial and conviction of Negro defendants charged with crime, the exclusion of members of said defendant's race from grand and/or petit juries by jury commissioners over a long period of years, solely on the bases of race and color, is a denial to such defendants of equal protection of the laws, is so notorious as to make unnecessary the citation of authority. The issue in each case, therefore, resolves itself into a determination from the facts [fol. 10] in the case of whether or not the discriminatory exclusion alleged exists. Accordingly, the petitioner at this point directs the Court's attention to the facts in his case.

It can be singularly noted from the record in this cause that of the sixteen or more witnesses introduced both by the defendant and the State on the trial of the issue raised by defendant's motion challenging the array of petit jurors, everyone of said witnesses testified that prior to the calling of the special venire of 100 jurors to serve in this cause, in which the names of about six or seven Negroes were included, for a period of as far back as 31 years or more no Negro had ever been summoned to serve, or had ever served on either a petit or grand jury in Vance County, from which County came the jury that tried and convicted this defendant. Some of the pertinent testimony on this issue is the following:

F. H. Ellington, Chairman of the Board of Commissioners of Vance County, testified:

"I have lived in Vance County since 1915, that is, about 34 years, and during that 34 years I have never known a Negro to be called for jury, grand or petit."  
(R. p. 16)

H. M. Robinson, Clerk to the Board of Commissioners of Vance County for the past 19 years, testified:

"As Clerk to the Board I am present when persons are drawn for jury duty in Vance County; I don't know when Negroes were drawn for jury duty in Vance



County; I write down the names they read to me; I do not know whether any Negroes' names were drawn for jury duty during those 18 years." (R. p. 18)

E. A. Cottrell, Sheriff of Vance County, testified:

"I have been the Sheriff of Vance County for 7 years and have lived in the County all my life. As the Sheriff of my County, summoning of the jurors comes under my supervision. During my 7 years as Sheriff no Negroes have been drawn from the jury box to serve on the jury, and I do not know of any colored people summoned for jury duty." (R. p. 23)

L. B. Faulkner, Deputy Sheriff of Vance County, testified on cross-examination by defendant:

"I have been Sheriff almost 7 years, and I have summoned jurors before this time, but I have never summoned Negroes before this time." (R. p. 32)

Ed Young, witness for defendant, testified, in substance, [fol. 11] that he was 70 years of age, had lived in Vance County all of that time, and that for the past 25 or 30 years he had never known a colored person to be called for jury duty; that further back than 25 or 30 years his father served on the jury, but since that time he had not seen any colored person serve. (R. pp. 24-25)

Rev. Thomas J. Johnson, witness for defendant, testified, in substance that he had lived in Henderson 40 years; that he had attended court in Vance County for the past several years; that he had never seen a Negro serve on a jury in Vance County; that he had never known a Negro to be called for jury duty in Vance County; that he went as far as the 8th grade in school; that he had never been called for jury duty. (R. 26)

William M. Stamper, witness for defendant, testified, in substance, that he was born in Vance County 63 years ago and had been residing there permanently for the past 18 years; that he is a retired United States Army man; that he went to the 7th grade in school and could read and write; that during the past 18 years he has attended Court in Vance County; that he had never known any colored person

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to be summoned for jury duty prior to the summoning of the instant special venire; that he had never been called for jury duty. (R. p. 27)

Frank M. Dorsey, Vance County Tax Collector, testified:

"I am the County Tax Collector for Vance County and have had this position since 1937 . . . I have lived in Vance County for 32 or 33 years, and I haven't ever known Negroes to be summoned for jury duty." (R. p. 29)

G. W. Knott, member of the Board of Commissioners of Vance County, testified on cross-examination by petitioner:

"I have lived in Vance County for 49 years, and I do not know of any colored people who have been called prior to this special venire." (R. p. 34)

Mark C. Woodliff, member of the Board of Commissioners of Vance County, testified on cross-examination by petitioner:

"I have lived in Vance County all of my life, about 52 years, and I have never seen colored people serving on juries . . . I have never known a Negro to serve on jury or be summoned for jury duty." (R. p. 36)

W. H. Blacknall, member of the Board of Commissioners of Vance County, testified on cross-examination by defendant:

"I have lived in Vance County for 46 years, and, I have never known Negroes to be drawn for jury duty [fol. 12] or ever served on any jury in this County." (R. p. 38)

It is significant, and, it is submitted, trustworthily indicative of the true facts in the case, that on the day following the drawing of the special venire to serve in this case, in the office of the Clerk of the Vance County Superior Court, in Henderson, the Henderson (N. C.) Daily Dispatch, in its Tuesday, August 30, 1949 issue, on page 3, Column 5, in announcing the drawing of the special venire from Vance County to serve in this case, stated that this was "the first

time in half a century Negroes have been selected for jury service from this county." Henry B. Dennis, editor of the Henderson (N. C.) Daily Dispatch, called as a witness for petitioner, in connection with his motion challenging the array, testified:

"I live in Vance County and have lived there lack about a few months of being 35 years. I am editor of the Henderson Daily Dispatch and have been for the past 35 years, and during this time I have never known Negroes to serve on the juries in Vance County, but I haven't been present to every trial held in this County. I am accustomed to list the jurors in my paper every time they have a term of court, and I can't say for sure that I have printed names of colored persons; I don't recall, but I have not paid any particular attention to it. I did not say I did not know of any being called; I do not know of any having served, that is, prior to this special venire drawn." (R. p. 39)

It is unmistakably clear from the foregoing testimony, which was elicited from witnesses both for petitioner and the State, and which is typical of all of the testimony on the point, that up until the calling of the special venire in this case, for a period from 30 to 50 years no Negro had ever been summoned or had ever served on a grand or petit jury in Vance County. The importance of this testimony is emphasized and the case for petitioner is immeasurably borne out by the revelation in the record that during the past 15 years alone some three thousand seven hundred forty-five persons have been summoned for jury duty in Vance County. (R. pp. 18, 40-41) and not a Negro was among them.

The United States Census for 1940 discloses that the population of Vance County consisted of 15,966 white persons and 13,958 Negroes, the Negro population comprising 46.6% of the total population. According to the testimony in the Record, Negroes comprised approximately one-third of the taxpayers in Vance County (R. p. 29), from which list persons are drawn for jury duty. Aside from the fact that the foregoing proportion of Negroes has never been even remotely reflected in the proportion of persons sum-

[fol. 13] moned for jury duty in Vance County, the undisputed testimony in this case shows that prior to the summoning of the special venire in this cause, for more than fifty years no Negroes had ever been summoned for grand or petit jury service in Vance County.

Despite the claim of the jury commissioners of Vance County during the course of the taking of evidence on this issue that they excluded persons in the county from jury duty solely because of lack of qualifications and not because of race, the testimony of reputable witnesses was to the effect that there are Negroes in Vance County qualified for jury service (R. pp. 27, 38). On this point, W. H. Blackna, a member of the Board of Commissioners of Vance County, testified:

"I do know there are Negroes competent enough to serve on juries in Vance County prior to the purging in July, 1949 (the date the special venire in this case was called, which jury for the first time in 50 years or more included the names of Negroes). I cannot name any of them, but I know some." (R. p. 38).

The contention that there have been no Negroes qualified for jury duty in Vance County over the past 50 years would appear untenable to the most uninformed and would be a serious indictment of educational standards in Vance County and the State of North Carolina. This contention is further rendered for naught when it is considered that despite the contention that there were no Negroes in Vance County qualified for jury service, the names of seven Negroes were suddenly and surreptitiously included in the special venire called to try this cause,<sup>5</sup> and also when it is considered that

<sup>5</sup> It is more or less common knowledge in the State of North Carolina that in the past three years during which time this case has been tried and re-tried that the issue of exclusion of Negroes from jury service in the counties embracing the Black Belt of North Carolina, that is, the counties including Vance County, the County from which the trial jury in this cause was called, and Bertie County, the venue of the trial of this cause, which two counties, along with Hertford, Northampton, Halifax, and Warren Coun-



[fol. 14] responsible witnesses testified that prior to the alleged July, 1949 purge of the jury box in Vance County (upon which purge the state courts placed so much emphasis and based their rulings, in the face of an admitted violation of the constitutional guaranty prior thereto) that the names of Negroes had been consistently placed in the jury box (R. pp. 17, 22-23, 33-34, 42). In this connection, the United States Supreme Court said, in *Hill v. Texas*, supra, at 404:

"With the large number of colored male residents of the County who are literate, and in the absence of any

ties, constitute the Third Judicial District of North Carolina, in all of which counties, with the exception of Vance County the racial proportion of which is herein set out, the Negro population outnumbers the white, has been consistently challenged. At the outset of the trial of the present case, the fact that the trial jury herein would come from Vance County was made known to the Sheriff and Clerk of the Superior Court of Vance County by a telephone call from the Bertie County Superior Court, out of the presence and hearing of the defendant and his attorneys, although same does not appear on record. Henderson, the county seat of Vance County is approximately 120 miles from Windsor, the county seat of Bertie County, the distance which had to be traveled by the State Solicitor and the defendant and his attorneys to engage in the drawing of the special venire. The defendant, in his motion challenging the array of petit jurors specifically challenged the drawing of the special venire summoned in connection with his case (R. p. 13). These facts, together with the revelation made during the taking of testimony on the jury issue, that the jury scrolls bore a tell-tale marking which permitted the jury commissioners to tell Negroes from white persons (see infra), bear out the conclusion, through the unprecedented summoning of seven Negroes on the special venire in this cause, that the exclusion of Negroes from jury services in Vance County theretofore was not predicated upon a paucity of qualified Negroes, but pursuant to a studied and systematic plan of keeping Negroes off juries in said county solely and wholly on account of race.

countervailing testimony, there is no room for inference that there are not among them householders of good moral character who can read and write, qualified and available for grand jury service."

By statute in North Carolina (General Statutes of North Carolina, 1943, section 9-1), and as testified to by H. M. Robinson, Clerk of the Board of Commissioners of Vance County (R. pp. 22-23), the jury box of Vance County has been purged every odd year since 1905. This fact, together with the testimony of witnesses, heretofore referred to, that the names of Negroes have always been in the jury box of Vance County, robs the alleged jury box purged of July, 1949, after which the special venire in this case was called, of the importance and significance which the state courts attributed to it, and bears out petitioner's contention that the summoning of the special venire called in this case, as well as jury drawings in Vance County over the past fifty years, was based upon a studied plan of excluding Negroes from jury service in Vance County solely on account of race.

Furthermore, several of the jury commissioners, during the taking of testimony on this issue, boasted of the fact that they summoned for jury duty only persons whom they personally knew to be of sufficient intelligence and good moral character, and that Negroes were excluded from such lists because they did not personally know of any Negroes who possessed such qualifications (R. pp. 21, 33, 33-34, 35, 36). However, the United States Supreme Court emphatically reiterated the proposition, in *Cassell v. Texas*, supra, that in selecting persons for jury duty, the jury commissioners have an obligation to go outside of their personal knowledge and visage in ascertaining persons in their county eligible for jury duty. In this connection, this Court said, in the *Cassell* case, 70 S. Ct., at page 632:

"In explaining the fact that no Negroes appeared on this grand jury list, the commissioners said that they knew none available who qualified; at the same time they said they chose jurymen only from those people with whom they were personally acquainted. It may [fol. 15] be assumed that in ordinary activities in Dal-

las County, acquaintanceship between the races is not on a sufficiently familiar basis to give citizens eligible for appointment as jury commissioners an opportunity to know the qualifications for grand-jury service or many members of another race. An individual's qualifications for grand-jury service, however, are not hard to ascertain, and with no evidence to the contrary, we must assume that a large proportion of the Negroes of Dallas County met the Statutory requirements for jury service. When the commissioners were appointed as judicial administrative officials, it was their duty to familiarize themselves fairly with the qualifications of the eligible jurors of the county without regard to race or color. They did not do so here, and the result has been racial discrimination. We repeat the recent statement of Chief Justice Stone in *Hill v. Texas*, 316 U. S. 400, 404, 62 S. Ct. 1159, 1161, 86 L. Ed. 1559; 'Discrimination can arise from the action of commissioners who exclude all Negroes whom they do not know to be qualified to serve. In such a case, discrimination necessarily results where there are qualified Negroes available for jury service. With the large number of colored male residents of the county who are literate, and in the absence of any counter-vailing testimony, there is no room for inference that there are not among them householders of good moral character, who can read and write, qualified and available for grand jury service.'

"The existence of the kind of discrimination described in the *Hill* case does not depend upon systematic exclusion continuing over a long period and practiced by a succession of jury commissioners. Since the issue must be whether there has been discrimination in the selection of the jury that has indicted petitioner, it is enough to have direct evidence based on the statements of the jury commissioners in the very case. Discrimination may be proved in other ways than by evidence of long continued unexplained absence of Negroes from many panels. The statements of the jury commissioners that they chose only whom they knew, and that they know no eligible Negroes in an area where Negroes

made up so large a proportion of the population, proved the intentional exclusion that is discrimination in violation of petitioner's constitutional rights."

It is apparent, from the record in this case that the State, considering the manner in which it proceeded in its defense of this issue and its concession, adopted the theory that what happened with respect to juries and jury drawings in years past, that is, prior to the summoning of the special venire to sit in this cause, was of no moment with respect to the issue at hand, the sole consideration being, according to the State, the character of the special venire called to try "this case." (R. pp. 19, 39, 52-53). If there is anything that the cases heretofore cited emphasize, it is that one cannot undertake to show discrimination by "one instance." On an issue of this sort, the cases reveal that as a part of his case in showing the arbitrary exclusion of members of his race from jury service, the defendant must resort to evidence of the status and character of juries [fol. 16] prior to his trial and conviction, to avoid a possible conclusion of "chance" exclusion. On this point, the United States Supreme Court said, in *Patton v. Mississippi*, supra, at 466:

"In this case the Mississippi Supreme Court concluded that petitioner had failed to prove systematic racial discrimination in the selection of jurors, but in so concluding it erroneously considered only the fact that no Negroes were on the particular venire lists from which the juries were drawn and indicted and convicted petitioner. It regarded as irrelevant the key fact that for thirty years or more no Negro had served on the grand and petit juries;"

and at 468:

"The above statement of the Mississippi Supreme Court illustrates the unwisdom of attempting to disprove systematic racial discrimination in the selection of jurors by percentage calculations applied to the composition of a Single Venire." (Emphasis added).

In further support of his contention that the exclusion of Negroes from juries and jury service in Vance County



over the years was studied and purposeful, the defendant, in his examination before the court of the scrolls in the jury box,<sup>9</sup> brought to light the fact that despite much profession to the contrary (R. pp. 22, 23, 33, 36, 42), the scrolls in said box were ingeniously marked so as to permit those handling said scrolls to tell the scrolls containing the names of prospective white jurors from those of Negroes. The evidence in the record discloses that with a few chance exceptions each of the scrolls bearing the name of a Negro, that is, every scroll examined before the court, contained an identifying "dot" or "period"<sup>10</sup> from which one could at a glance tell that the person whose name said scroll con-

<sup>9</sup> The Record will reveal, at pages 52-53, that despite insistent requests by defendants, the court denied defendant opportunity to examine all of the scrolls in the jury box, as a means of showing the extent to which said scrolls were distinctively marked to enable the jury commissioners to carry out, as he contended, their studied and purposeful scheme of excluding Negroes from jury duty. However, it was uncontradictorily apparent that from all of the scrolls examined, a system and scheme of tell-tale markings was being following by the commissioners. The Record also reveals, at pages 53 and 153, that the defendant excepted to the denial of the opportunity to complete his evidence in this respect, and assigned the same as error.

<sup>10</sup> This Court is familiar with the fact that the history of the issue of exclusion of Negroes from jury service reveals that many and sundry methods have been adopted by jury commissioners to mark scrolls containing the names of Negroes eligible for jury duty so as to be able to distinguish them from the whites. This followed the detection of the obviously unconstitutional practice of omitting the names of Negroes from the jury box altogether. In some instances the names of Negroes were put in "red type" while those of whites were in black type; in others, after the names of Negroes was written the abbreviation "col." to distinguish them. The detection of all of the methods have spurred on the zeal of those bent upon discriminating against Negroes in this respect, to find new, more ingenious and less easily discernible ways of achieving the desired results.

[fol. 17] tained was a Negro. On the other hand, it was patently evident that no such "dot" or "period" was placed behind the name of a white person, and when these two sets of scrolls were placed side by side, the distinguishing mark on the scrolls of Negroes was easily and readily discerned.<sup>11</sup>

It was to be expected that the officers in charge of jury drawings would deny that this detected mark of distinction was put on the scrolls containing the names of prospective Negro jurors for an ulterior purpose; yet no plausible reason was offered or could be offered for its presence. The fact of its presence, together with the other uncontroverted evidence on the issue, can lead only to the conclusion that this so-called minor, but tell-tale, marking was placed on the scrolls containing the names of Negroes to distinguish the Negroes from the whites and thus to enable the commissioners to overlook them in the selection of persons to serve on juries in Vance County. As the United States Supreme Court said in *Smith v. Texas*, supra, the federal constitution outlaws "ingenious" as well as "ingenuous" methods adopted for the purpose of depriving defendants of their rights.

5. That, as aforesaid, the petitioner has exhausted all of his state remedies, including a petition for a writ of certiorari to the United States Supreme Court, and petitioner is, therefore, remediless save in this Court and by this procedure.

6. That no previous application has been made for the writ herein prayed for.

<sup>11</sup> A close examination of the jury scrolls in this instance revealed that those in charge of preparing such scrolls went to such careful extreme to avoid confusion and the possible inclusion in the jury list of the names of Negroes that even where the name of a white juror ended in "Jr." or "Sr.", the "Period" was omitted from behind such abbreviations. This is a fact although testimony or evidence to this effect does not appear in the record.

Wherefore, the premises considered; the petitioner prays:

(1) That a writ of habeas corpus directed to the said respondent, J. P. Crawford, may issue in his behalf so that petitioner may be brought forthwith before this Court;

(2) That said respondent be required to appear and answer the allegations of this petition;

[fols. 18-20] (3) That following a full and complete hearing this Court relieve petitioner of said unlawful detention, imprisonment and sentence of death;

(4) That this Court issue forthwith an injunction specifically enjoining and restraining the respondent, J. P. Crawford, and his agents, officers and/or employees from putting into execution any sentence or judgment now standing against, or that has been imposed upon, this petitioner, in particular, in putting into execution on the 3rd day of November, 1950, or at any other time, the death penalty presently pending against petitioner, until such time as he and/or they shall have received direction and instruction in the premises from this Court.

(5) And for such other and further relief as to this Court may seem just and proper under the circumstances.

Raleigh Speller, Petitioner.

*Duly sworn to by Raleigh Speller. Jurat omitted in printing.*

[fol. 21]

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT  
OF NORTH CAROLINA

[Title omitted]

ANSWER OF RESPONDENT, J. P. CRAWFORD, WARDEN OF CENTRAL PRISON OF THE STATE OF NORTH CAROLINA, RALEIGH, NORTH CAROLINA—Filed November 17, 1950

The Respondent, J. P. Crawford, Warden of the Central Prison of the State of North Carolina, Raleigh, North Carolina, answering the Petition for Writ of Habeas Cor-

pus, filed herein by Petitioner Raleigh Speller, for his answer, says:

### I

The allegations of Article 1 of the Petition are not denied.

### II

Answering the allegations of Article 2 of the Petition, the Respondent admits that the Petitioner is in his custody and confined in the Central Prison of the State of North Carolina, Raleigh, North Carolina, by virtue of a judgment and commitment containing a sentence of death by asphyxiation pronounced upon the Petitioner by the Superior Court of Bertie County, North Carolina, on September 5th 1949, as a result of the indictment and conviction of the Petitioner of the crime of rape after a full and fair trial in accordance with the laws of the State of North Carolina, in which Petitioner's guilt was judicially established; the Respondent denies that the imprisonment, restraint and sentence are illegal or void. It is denied that the Petitioner was denied the equal protection of the laws in violation [fol. 22] of the Fourteenth Amendment to the Constitution of the United States in said trial and the Respondent is advised and alleges that said conviction and sentence cannot be collaterally attacked in this proceeding. All other allegations contained in said Article 2 not herein admitted or denied, or admitted or denied in Respondent's further answer are untrue and are denied.

### III

Answering Article 3 of the Petition, the Respondent denies that the Petitioner, Raleigh Speller, was at the time of the commission of the crime or of his conviction an illiterate and feeble-minded Negro and no evidence was presented during the course of his three trials to establish such illiteracy or feeble-mindedness. It is admitted that the Petitioner was thrice tried and convicted in the Superior Court of Bertie County, North Carolina, on a bill of indictment returned at the August 1948 term of Superior Court of Bertie County by a Grand Jury consisting of members of both the white and negro races charging the



Petitioner with the crime of assault and rape on the 18th day of July 1947, of a white woman by the name of Mrs. Aubrey Davis, about 50 years of age, and that the Petitioner appealed from each of said convictions to the Supreme Court of North Carolina, which appeals are reported as State v. Raleigh Speller, 229 N. C. 67, 47 S. E. 2d, 537; State v. Raleigh Speller, 230 N. C. 345, 53 S. E. 2d, 294, and State v. Raleigh Speller, 231 N. C. 549; and on the first appeal the Petitioner was granted a new trial because of jury defect and on the second appeal for failure to allow the Petitioner sufficient time or opportunity to present his challenge to the array and upon the third appeal the Petitioner's conviction was affirmed by the North Carolina Supreme Court. It is admitted that when the Petitioner's case was called for trial upon the third occasion, at the August 1949 term and upon the bill of indictment found at the August 1948 term of said Court, the presiding Judge, upon motion of the Petitioner, ordered a special venire to be drawn from Vance County in the same [fol. 23] Judicial District as Bertie County, and the most remote County in said District; that the Petitioner was afforded ample opportunity to examine the jury boxes from which said jury was drawn to determine whether or not, pursuant to a long and continuous practice, Negroes had been discriminated against in the selection of juries, solely on account of race and/or color; that after the jury boxes had been brought into the Courtroom and numerous names drawn therefrom and evidence heard, the Court found the facts as fully appear in the record and denied the Petitioner's motion to quash the array. That thereafter upon the evidence introduced at said trial, as detailed in the copy of the record of said trial, filed herewith, the Petitioner was convicted of the capital crime of rape without recommendation of mercy and sentenced to death by asphyxiation.

The Respondent avers that Article 3 of the Petition sets out contentions of the Petitioner as to the facts involved in this case and inferences and conclusions of Petitioner's counsel with respect thereto, all contrary to the findings of the trial court and jury which duly convicted the Petitioner after a full and fair trial; that except as herein admitted, and as may be admitted by Respondent in further answer to

the Petition, the allegations of Article 3 are untrue and are denied.

#### IV

It is admitted that upon the affirmation by the Supreme Court of North Carolina of Respondent's third conviction and sentence, the Petitioner applied to the Supreme Court of the United States for a Writ of Certiorari to review the decision of the Supreme Court of North Carolina, and that on the 9th day of October 1950 the Supreme Court of the United States denied said application for said Writ, which Writ was based upon the same facts, arguments, contentions as to the law which the Petitioner now requests this Court to review upon this Petition for a Writ of Habeas Corpus. [fol. 24] It is denied that the extracts from the evidence introduced in the course of the trial in the Superior Court of Bertie County, set out in Article 4, constitutes a fair statement of all said evidence but consists only of those portions which the Petitioner considers favorable to him. The Respondent is filing herewith a copy of the record of the proceedings in the Vance County Superior Court and reference is made to the same for a statement of all the proceedings and evidence presented in said case.

The allegations of Article 4 consisting of contentions of Petitioner as to the facts, inferences and conclusions of counsel for Petitioner, with an admixture of legal arguments and citations of legal authorities, all commingled together, Respondent is advised and believes and, therefore, alleges that all allegations relating thereto should be stricken from the Petition. That except as herein admitted, or as may be admitted by the Respondent in further answer to his Petition, the allegations of Article 4 of the Petition are untrue and are, therefore, denied.

Further answering said Petition for the purpose of the dismissal of same, and by way of plea in bar of the relief sought in said Petition, the Respondent, J. P. Crawford, warden of the Central Prison of the State of North Carolina, says and alleges:

1. That the Petitioner was indicted for the crime of rape in the first degree in the Superior Court of Bertie County, North Carolina, for assault and rape perpetrated upon Mrs.

Aubrew Davis, a white woman about 50 years of age; that the crime of rape in the first degree is prohibited by the statute and the laws of the State of North Carolina, and the penalty for said crime, upon the conviction of same, without recommendation for mercy, is death by asphyxiation to be administered by the Warden of the Central Prison in the State of North Carolina; that the Superior Court of Bertie [fol. 25] County is a court of general jurisdiction and had jurisdiction over the offense charged and over the person of the Petitioner, and at no time lost such jurisdiction during the three trials of the Petitioner.

That after the Petitioner had previously been arraigned and caused a plea of "not guilty" to be entered he, for the first time, challenged the array of petit jurors. After the Court held a hearing, at which the Petitioner had been afforded an opportunity to examine the jury boxes and the scrolls therein, in open court, and had offered evidence attempting to show that members of the Negro race had been purposely and systematically excluded from juries solely because of their race and/or color. The Court made full and complete findings of fact as will appear in the record filed herewith and over-ruled or dismissed said motion of challenge to the array of petit jurors and said cause was duly tried by a jury drawn from a panel containing members of the Negro race, which jury returned a verdict of guilty of rape in the first degree, without recommendation of mercy. The Petitioner was sentenced to death under mandatory laws of the State of North Carolina upon the conviction of such offense; that said Petitioner, together with said judgment of death, made in writing, was transmitted to the Respondent for the purpose of carrying out said sentence as required by law, and the Respondent detains and has the Petitioner in his custody under said judgment or sentence of death as commanded by the Superior Court of Bertie County for the purpose of executing and carrying out said judgment as provided by law. That a duly certified copy of the record and proceedings had in the trial of the petitioner in the Bertie County Superior Court, including a transcript of evidence as transcribed and reported by the official Court Reporter and including a copy of the sentence or judgment of death by virtue of which

[fol. 26] Respondent detains and has custody of Petitioner, is filed herewith, and made a part of this Paragraph as if fully set forth herein; that Respondent is advised and believes and so alleges: that said sentence or judgment was pronounced, entered and signed by a Court having jurisdiction to indict and place Petitioner on trial, that Petitioner was convicted after a regular, proper, lawful and constitutional trial was had, and said judgment or sentence pronounced upon Petitioner is valid, legal and constitutional, and said proceedings, trial and judgment are here pleaded in bar of any rights the Petitioner may have to seek the relief demanded in his Petition.

Upon advice of counsel it is alleged that the Petitioner cannot employ a Habeas Corpus as a substitute for an appeal or Writ of Error, thereby collaterally attacking the proceedings and judgment of the State Court, such collateral attack being based upon the same facts, law, arguments and motion challenging the array of the trial jury as set forth in the Petition for a Writ of Certiorari to the United States Supreme Court which was denied by said Court. That the Petitioner filed a transcript showing the proceedings in the trial of the case in the Bertie County Superior Court, both in the Supreme Court of North Carolina and the Supreme Court of the United States and the adjudications of said courts are here pleaded as grounds for the dismissal of the Habeas Corpus proceeding and the discharge of any Writ of Habeas Corpus issued herein, and in bar of any rights that the Petitioner may have to seek relief in this proceeding.

## V

Respondent, therefore, shows the Court that the Petitioner is in his custody and is being detained by him pursuant to the judgment and commitment issued by the Bertie County Superior Court and for the reasons above alleged, is informed and believes that said judgment was valid, legal and proper, being pronounced and signed by a Court having jurisdiction of the crime of which the Petitioner was charged, tried and convicted; that he is entitled to the custody of the Petitioner until such time as he may [fol. 27] be dealt with for the purpose of carrying out the



requirements of the judgment issued by said Court as provided by the laws of the State of North Carolina.

Wherefore, Respondent prays the Court:

1. That the Petition for a Writ of Habeas Corpus heretofore filed in this cause be dismissed.

2. That any Writ of Habeas Corpus that may have been issued or may issue or that may be issued in this cause be denied, dismissed and discharged.

3. That the order or injunction heretofore issued restraining Respondent and putting into effect the judgment or commitment under which the Respondent has custody of and detains the Petitioner be dismissed.

4. That the judgment and commitment under which Respondent holds Petitioner and under which he detains and has custody of Petitioner be declared to be a legal, valid and proper judgment and not subject to any attack in a Habeas Corpus proceeding.

5. That Respondent be authorized to carry out and execute said judgment in accordance with the laws and statutes of the State of North Carolina.

6. For such other and further relief to which Respondent may be entitled, and which may be proper in this proceeding.

Harry McMullen, Attorney General of North Carolina; H. J. Rhodes, Assistant Attorney General; R. Brookes Peters, General Counsel of the State Highway and Public Works Commission; E. O. Brogden, Jr., Attorney and Member of Staff of State Highway and Public Works Commission, Attorneys for Respondent, J. P. Crawford, Warden of the Central Prison of the State of North Carolina, Raleigh, North Carolina.

[fols. 28-33]. *Duly sworn to by J. P. Crawford. Jurat omitted in printing.*

[fol. 34]

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT  
OF NORTH CAROLINA

[Title omitted]

RETURN TO WRIT—Filed December 19, 1950

To His Honor Don Gilliam, United States District Judge  
Presiding over the District Court of the United States  
for the Eastern District of North Carolina, Raleigh  
Division:

The respondent, J. P. Crawford, Warden of the Central  
Prison of the State of North Carolina, Raleigh, N. C., re-  
spectfully makes the following return to the Writ of Habeas  
Corpus issued to him on the 18th day of December, 1950.

1. That in his official capacity he has the said Raleigh  
Speller in custody at Central Prison, Raleigh, North Caro-  
lina.

2. That the authority under which he has the said Raleigh  
Speller in custody and imprisonment is by virtue and  
authority of a Judgment from the August Term, 1949, of  
the Superior Court of Bertie County, a photostatic copy  
of which is hereto attached and by reference made a part  
of this return. That a certified copy of said Judgment will  
be produced and exhibited to Your Honor upon the return  
of this writ.

3. That the answer heretofore filed by the undersigned  
respondent in opposition to the petition for Writ of Habeas  
Corpus, filed in this proceeding and now pending before  
this court, is hereby referred to and made a part of this  
return for the purpose of showing the authority by which  
the aforesaid Raleigh Speller is being held in custody and  
imprisonment.

4. That upon the return of said writ at the time and  
place therein set out or designated by Your Honor, he now  
has before Your Honor the body of the said Raleigh Speller  
as by said Writ commanded.

[fol. 35] And having made a full return of said Writ, he

now stands ready and willing to receive, abide by, and perform such orders as Your Honor may make in the premises.

J. P. Crawford, Warden of the Central Prison of the State of North Carolina.

*Duly sworn to by J. P. Crawford. Jurat omitted in printing.*

[fol. 36]

# EXHIBIT I TO RETURN

IN THE SUPERIOR COURT, AUGUST TERM, 1949

North Carolina, Bertie County

STATE OF NORTH CAROLINA

VS.

RALEIGH SPELLER

## JUDGMENT

The defendant, Raleigh Speller, having at this term of the Superior Court of Bertie County been convicted by a jury of the capital offense of rape, as charged in the bill of indictment:

It is, therefore, ordered and adjudged that the said prisoner, Raleigh Speller, suffer for the crime the penalty of death, as provided by law, and to that end it is, therefore, ordered and adjudged that the Sheriff of Bertie County, in whose custody the prisoner, Raleigh Speller, now is, forthwith convey to the State's Prison at Raleigh such prisoner, Raleigh Speller, and deliver said prisoner, Raleigh Speller, to the Warden of the said State's Prison who, the said Warden, on Friday, the 28 day of October, 1949, between the hours of six A. M. and eleven A. M. of the same day, shall cause the said Raleigh Speller to be conveyed to the place of common execution, as provided by law, and then and there, as provided by law, shall cause the said prisoner, Raleigh Speller, to inhale lethal gas of sufficient quantity to cause death, and the administration of such lethal gas shall be continued until the said Raleigh Speller is dead. And may the Lord have mercy on his soul.

Done at Windsor, North Carolina, this the 5 day of September, 1949.

W. I. Halstead, Special Judge Presiding.

NORTH CAROLINA,  
Bertie County:

I, Geo. C. Spoolman, Clerk of the Superior Court of Bertie County, North Carolina, do hereby certify the foregoing to be a full, true and perfect copy of the Judgment in State vs. Raleigh Speller.

Witness my hand and official seal, this the 5th day of September, 1949.

Geo. C. Spoolman, Clerk Superior Court.

[fol. 37]

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT  
OF NORTH CAROLINA

[Title omitted]

MOTION TO DISMISS—Filed January 3, 1951

The Respondent, J. P. Crawford, Warden of the Central Prison of the State of North Carolina, Raleigh, North Carolina, now moves the Court to dismiss the Petition for Writ of Habeas Corpus filed in this cause; to dismiss and discharge the Writ of Habeas Corpus heretofore issued in this cause; and that the Petitioner be remanded to the custody of Respondent for the purpose of making effective the sentence based upon the Judgment of the Superior Court of Bertie County, for the reasons and grounds following:

1. For that the record of the proceedings in the State Courts in the case of Petitioner, a certified copy of same being filed in this Court, discloses that the Supreme Court of North Carolina, the highest appellate court in the State of North Carolina, had jurisdiction to review upon appeal the matters and things about which Petitioner now complains and seeks a review in the Federal District Court by



Petition and Writ of Habeas Corpus, and cannot now have a review of these same questions by Writ of Habeas Corpus in the Federal Court, as a substitute for an appeal.

2. For that the record of Petitioner's trial in the Superior Court of Bertie County, North Carolina, does not show or disclose any exceptional circumstances of peculiar urgency in connection with said trial that require the inter-[fol. 38] vention of a Federal Court by Habeas Corpus; that said record as well as said Petition of Writ of Habeas Corpus discloses that there has not been any gross violation of constitutional rights of Petitioner such as to deny the substance of a fair trial or that Petitioner was prevented from raising any questions for his defense on said trial because of ignorance, duress or other reason for which Petitioner should not be held responsible.

3. For that the Petition discloses that Petitioner seeks a review by Writ of Habeas Corpus of the issue as to whether or not members of Petitioner's race were unconstitutionally excluded from service on Grand and Petit juries in Bertie County, North Carolina, and such question or issue having been raised, tried and heard in the State Court and decided adversely to Petitioner, the same cannot now be reviewed by Writ of Habeas Corpus; that said issue or question of alleged jury discrimination has been reviewed by the Supreme Court of North Carolina on appeal by Petitioner and his application for Writ of Certiorari having been denied by the United States Supreme Court, cannot now have said questions or issue reviewed by the Federal Court on Writ of Habeas Corpus; that if there was error in the decision of the State Court on the question or issue of jury discrimination the same was an irregularity and not a jurisdictional defect and cannot now be reviewed by Writ of Habeas Corpus.

[fols. 39-41] Harry McMullan, Attorney General of North Carolina; Hughes J. Rhodes, Assistant Attorney General of North Carolina; Ralph Moody, Assistant Attorney General of North Carolina; R. Brookes Peters, Jr., General Counsel State Highway & Public Works Commission; E. O. Brogden, Jr., Attorney State Highway & Public Works Commission.

[fol. 42]

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT  
OF NORTH CAROLINA

[Title omitted]

**Transcript of Evidence**—Filed January 29, 1951

The above entitled action came on for hearing before the Honorable Don Gilliam, United States District Judge, in the courtroom of the Edgecombe County Courthouse in Tarboro, North Carolina, on January 3, 1951.

**APPEARANCES**

**Attorneys for Petitioner:**

Herman L. Taylor, Esq., Raleigh, N. C.

Caswell J. Gates, Esq., of Durham, N. C.

**Attorneys for Respondent:**

R. Brooks Peters, Esq., Raleigh, N. C., General Counsel  
State Highway & Public Works Commission.

Hugh J. Rhodes, Esq., Raleigh, N. C., Assistant Attorney  
General of North Carolina.

E. O. Brogden, Jr., Esq., Raleigh, N. C., Attorney for  
State Highway & Public Works Commission.

[fol. 43] Mr. J. P. Crawford, Warden of Central Prison  
of the State of North Carolina, is present in court with the  
petitioner, Raleigh Speller.

Respondent files formal motion to dismiss the petition for  
habeas corpus. The motion is denied. Respondent excepts.

**COLLOQUY BETWEEN COURT AND COUNSEL**

Mr. Taylor: I call attention to the stipulation of counsel  
entered into in November with respect to the fact that the  
record of this case in the Superior Court of Bertie County  
is admitted in this case.

The Court: When was this case tried?

Mr. Taylor: August, 1949. I wonder if they will agree  
that prior to the time of the calling of the special venire in  
this case no negro had served on a grand jury or petit jury  
for Vance County in fifty years?

Mr. Peters: We will not agree to that.

Mr. Taylor: I am wondering if they will stipulate that no negro was on the trial jury that convicted this defendant?

Mr. Rhodes: We will not agree to that. It is shown affirmatively that negroes were on the panel.

Mr. Taylor: I want to have them stipulate that prior to the July occurrence the jury commissioners of Vance County had every two years purged the jury box of Vance County.

Mr. Peters: I think the record shows that.

Mr. Taylor: We would like opportunity to examine the books as we did in the other case. In the other case we had [fol. 44] another issue we could be trying while that was being done. We will have to have indulgence of the Court. We propose to proceed as we did in the other case. I was wondering if it would facilitate the trial if Your Honor would permit us to do that now.

The Court: You are speaking of the tax book?

Mr. Taylor: Yes, sir.

The Court: Mr. Peters told me there is no jury scroll book in this case.

Mr. Brogden: There is only one book in controversy and that is the tax list.

Mr. Rhodes: I want to be as lenient as we can. This case was tried by this same counsel in the Superior Court three times. They have had since December 18th to examine these records in the courthouse in Vance County. Now we come here and delay the Court to permit them to take these same records and examine them.

Mr. Taylor: We tried in the other case to examine the books in Greenville but didn't have opportunity to examine them as we should, though we had reasonable co-operation. I spent a whole day in Greenville and it couldn't be done. They would close the office and go to dinner and things like that.

Mr. Rhodes: I wouldn't want to be put in the position of saying the public citizens of Vance County would not permit any person to go in and examine the public records.

Mr. Brogden: I called them and asked them to give them [fol. 45] access to the books.

The Court: He said that in the case in Greenville, while

he had reasonable amount of co-operation he didn't have full opportunity to go in and check the books. I can understand that. He says he didn't attempt it in this case because judging from what happened in the other case he knew it to be futile. I ask the question, can you furnish now the books brought in response to the subpoena? Is the tax book for 1948 now in the courtroom?

Mr. Brogden: Yes, sir, it is here. Records of persons who served on the jury in Vance County from 1949, for the past five years. We have the records from 1948 up to now.

Mr. Taylor: That is all right.

The Court: The registration books, are they here?

Mr. Rhodes: They will be here.

Mr. Taylor: And all records in possession of the Register of Deeds that has bearing on selection of the jury. As clerk to the board of county commissioners he would have the minutes of the board.

The Court: As I understand it it is customary to set out on the minutes the names of the jurors drawn.

Mr. Robinson: Register of Deeds of Vance County: I have the minutes.

The Court: Are there any other books that you have that you think would have any bearing?

[fol. 46] Mr. Robinson: I have copy of the jury drawn which is in the minutes.

Mr. Brogden: He has double list of the tax book.

The Court: What examination do you wish to make?

Mr. Taylor: Your Honor is familiar with the procedure we followed in the other case.

The Court: Yes, but you don't have the same situation if there is no jury scroll. I don't know what you want to check against. The tax book and registration list?

Mr. Taylor: I think the absence of the jury scroll will not prevent us making a study. The minute book of the board of county commissioners contains names of persons called to serve on the jury and we could check that with the tax book. We can use that for the same purpose. Instead of having a scroll book they kept the names in the minutes. The same purpose is achieved as if kept in the scroll book.

The Court: I understand jury scroll is a list of all the names in the jury box. All that the minutes would show would be jurors drawn for service.



Mr. Taylor: I don't have any knowledge of it but there must be some source by which they set out the persons qualified for jury service. I suppose in the course of questioning of witnesses that could be determined.

Mr. Brogden: Since he doesn't seem to know what he will need it seems to me the best way is to go ahead with the [fol. 47] witnesses. It looks like a fishing expedition.

Mr. Taylor: It would be useless for me to proceed with questioning of witnesses if I don't have a basis. In the other case that phase was suspended while counsel checked the records.

Mr. Rhodes: The only record before the Court is the 1948 minute book. In the Pitt County case the names were taken both from the registration list and the tax list. In Vance County the names came entirely from the tax list. I don't see how the registration books would have any bearing on this case.

The Court: Was all the evidence before Judge Halstead to the effect that they came from tax book and no evidence to the contrary?

Mr. Rhodes: That is correct. Every witness said the names were taken from the tax list. The fact that they are qualified to vote would have no bearing on the fact whether they were qualified as jurors. They said they took the names from the tax list and they can only take the names from that list.

Mr. Taylor: The statute as amended was not restricted to Pitt County.

The Court: That is right. I don't know of any requirement that the county commissioners must put all qualified persons in the jury box. It doesn't say that every qualified person in the county shall be in the jury box.

Mr. Taylor: That may be true but if over a period of fifty [fol. 48] years they put five negroes' names in there that would go to the very heart of the thing.

The Court: You could show that numerous white people were qualified who were not in the jury box.

Mr. Taylor: We are requesting opportunity to examine the books.

The Court: I will work it out so that the petitioner will have every opportunity to show what the facts are. Nobody wants to take a course that deprives him of his life. At the

same time we have to proceed according to law and evidence and certain order. Here are these people from Vance County subpoenaed to bring the books. They have to stay until this matter is ended or until they are called upon to give their testimony. I had thought there would be no question but what we would finish this case today and tomorrow.

Mr. Taylor: Our examination may disclose much more than we are able to put before the Court now.

The Court: What kind of investigation? Here are certain records that have been brought here. There is no suggestion that anybody has withheld any records. Here are the registration books, tax book and minutes of the board of commissioners. That is all there is. What do you propose to do if I give you time to investigate? How will you proceed?

Mr. Taylor: It is a known fact that the record shows in the past eleven years some three thousand persons called [fol. 49] and that no negro has been called for jury duty. This is in the record. Showing that after the special venire was called and the Henderson Daily Record reported that for the first time in fifty years that prior thereto no negro had been called for jury duty in Vance County. He had been editor for thirty-five years and didn't know of any negro having been called for jury service. First of all, we don't care to take up any more of the Court's time than we possibly can.

Mr. Brogden: This special venire that went down there, he has got to take that one. He has got to show that this special venire was not properly constituted before he can make out his case.

Mr. Rhodes: The record shows that on several occasions the solicitor in the trial of this case made the statement that if defendant was able to show any discrimination as to the 1949 jury box he would not question whether or not any discrimination in the boxes preceding the 1949 box. In other words if the 1949 box in no way tainted with discrimination it doesn't make any difference whether the others were or not. He has just got to take the 1949 box and find there was discrimination in that box then we are not concerned with whether any discrimination preceding that.

Mr. Taylor: We are not assuming that the jury box from which this venire was drawn was properly constituted. The

other phase is whether there has been systematic discrimination.

[fol. 50] The Court: Let us assume there had been systematic discrimination of the negro race up to 1949 and that in 1949 the county commissioners took an entirely different view of it and that in that box, the box from which this panel was drawn, there was the inclusion of qualified negroes in that box and no objection can be found to the way it was constituted. Then what had happened in the years up to that time would that have any bearing upon it? Assuming the box from which this particular panel was drawn was legal box in which both negroes and whites qualified to serve, would you have anything?

Mr. Taylor: Yes, sir. In this record the commissioners testified that prior to 1949 they had negroes' names in the box. If that is true how could they have drawn seven negroes in 1949 and in fifty years had never drawn any? In this record, the jury scroll those negroes had identifying marks. How could they draw seven in one year when they had negroes' names in the box before that and had never drawn any before in fifty years?

Mr. Brogden: Petitioner and his counsel were there when the venire was drawn from the box.

The Court: There is no indication of how long it will take or what you propose to do. I feel that I would not be justified in waiting and keeping these people here for an indefinite length of time for some indefinite kind of investigation.

Mr. Taylor: All the jury scroll list is not here. They do have the jury box here. The jury box will contain the names [fol. 51] of all persons qualified for jury duty.

The Court: Do you want to have time to check each name in the jury box and find out if each person is negro or white and check that against the tax book and registration book?

Mr. Taylor: That is what we propose to do.

Mr. Rhodes: The jury box was brought in the courtroom and a large number of names were drawn from that box. Many of those names had before it or after it a dot but this record discloses that there were negroes who had dots before or after their names and whites who had dots before or after their names and persons who couldn't be identified

as to race who had dots before or after their names. He wants to take the jury box and drag out the same thing.

The Court: I don't understand that the petitioner is bound by the record.

Mr. Taylor: We objected to the trial Judge refusing us to examine the entire jury box.

Mr. Peters: The Judge before he proceeded, asked counsel if there was any further evidence and he said no.

Mr. Taylor: He had twice refused to let us go ahead with our examination of the jury box.

The Court: How many names in the jury box?

Mr. Robinson, Register of Deeds of Vance County: Probably a thousand.

The Court: Are you making any question about the grand jury in this case?

[fol. 52] Mr. Taylor: No, sir, trial jury only.

The Court: We must recognize this fact. Here is a case that is different from most cases in that a human life is involved. It wouldn't take me five seconds to decide that the petitioner ought not to have time to make further investigation but when I am faced with the fact that human life is at stake that makes a difference. You can't pass hurriedly over it.

Mr. Peters: Yes, sir, but this case has been to the State court three times and to the United States Supreme Court.

The Court: Now that it is before me I want to see that the petitioner gets every right that the law affords him.

H. M. ROBINSON, being first duly sworn, testified as follows:

Direct examination.

By Mr. Taylor:

Q. What is your full name?

A. H. M. Robinson.

Q. Mr. Robinson, do you hold any official capacity with Vance County?

A. Register of Deeds.



Q. How long have you been register of deeds in Vance County?

A. December 1, 1930.

Q. As Register of Deeds of Vance County do you have any relationship with the board of commissioners of Vance County?

A. Clerk to the board.

Q. How long have you been clerk to the board?

A. Since 1930.

[fol. 53] Q. Prior to 1930 did you hold any public office in Vance County?

A. I did not.

Q. As clerk to the board do you attend meetings held by the commissioners?

A. I do.

Q. You also attend meetings at each time they select persons to serve on juries in Vance County?

A. I do.

Q. Tell us what is your duty in respect to aiding the commissioners?

A. Write the name down that they call out.

Q. Where are those names obtained that are written down?

A. From the jury box.

Q. Do you know how the names first get into the jury box?

A. Commissioners have a list made and put it in there.

Q. Who makes that list?

A. I do, or it is under my supervision.

Q. Will you describe to the Court the procedure followed in making up that list?

The Court: You are referring to the 1949 box?

Mr. Taylor: I am speaking generally.

A. Name is taken from the tax book.

Q. Tell us what you do, how you go about doing it?

A. Make a list of names on the tax books and give it to the commissioners.

[fol. 54] Q. Do you do it or have someone else do it?

A. I read the names and a lady in the office copies them on the typewriter.

The Court: You read the names off of the tax book and the lady takes them down?

A. Yes, sir.

The Court: By what rule did you proceed in selecting those to be used as jurors? You didn't read them all out?

A. Mostly real estate I imagine.

(Direct examination resumed.)

Q. Are you familiar with the makeup of this tax book, with respect to race or respect to property holder?

A. Start with the beginning of the alphabet and go on through it?

Q. Is the book divided into white and negro race?

A. Yes.

Q. In which order does the white race come; if you know? Do you start with the white, beginning with "A" and exhaust the alphabet and then begin with the negroes, beginning with "A" and exhaust the alphabet?

A. Yes.

Q. Know how many townships in Vance County?

A. Nine.

Q. That same alphabetical arrangement is kept for each township in the tax book?

A. Yes.

[fol. 55] Q. With respect to the 1949 jury drawing will you state to His Honor the exact procedure you followed in determining the persons whose names would go in jury box No. 1?

A. I went through the book and made a list of the names and turned it over to the Commissioners the first of July.

The Court: 1949?

A: Yes, sir.

Q. You started with Henderson Township white and went through?

A. I didn't take the corporations.

Q. You started with Henderson Township and went through Henderson Township first?

A. Yes, started in the front of the book and went through it.

Q. You can answer my question, can't you? You started with Henderson Township first?

A. Yes.

Q. Went through Henderson Township?

A. I started at the front of the book and went through it.

Q. You went through Henderson Township first?

A. That's right.

Q. White and colored?

A. Yes.

Q. Then next you went through Kittrell Township?

A. Yes.

Q. Then went through Watkins Township?

A. Yes.

[fol. 56] The Court: You followed that process through the whole book?

A. Yes, sir.

Q. With respect to Henderson Township did you write down on the list you made the names of all persons you came to?

A. I didn't write every name.

Q. Upon what basis was a name excluded?

A. No particular basis.

Q. How did you arrive at the conclusion you would omit some and not others?

A. Just copied down the names of the people who had right much real estate.

Q. Did you follow that as to both white and negro?

A. Yes.

Q. Some of them you did leave off?

A. Yes.

Q. What is your explanation for leaving those off?

A. No particular explanation.

Q. You just in your discretion—

A. No discretion. I just made a list for the board.

Q. You say you omitted some names?

A. Yes.

Q. I am trying to get your explanation for omitting those names.

A. I just told you I made a list of the ones that showed the most property on there.

[fol. 57] Q. How much property does a man have to own before you put him on your jury list?

A. I don't know that he has to have any.

Q. You said you omitted some names and not others. On what basis did you omit some names?

A. All I know is just what I told you.

Q. You stated you took the names of those who had the most property?

A. I reckon the lady has a record of what I said.

Q. You don't recall having said that?

A. Said what?

Q. That you took the names of those who had the most property?

A. I may have.

The Court: Regardless of what you said what did you do? My recollection is that you made some statement about you took the persons who had considerable property. What did you actually do?

A. Went through the list, white and colored and took the names of those who had most real estate and personal property, both white and colored.

Q. Did you discriminate as to race?

A. No, sir.

Q. Did you put in every negro that you thought was of good moral character?

[fol. 58] A. I left that to the commissioners.

The Court: You were familiar with the provision of the statute that requires a person to be of good moral character, possess sufficient intelligence and be over twenty-one years of age to be qualified as a juror?

A. No, sir.

Q. Did you bear those qualifications in mind when making the list?

A. We have some minors and I didn't put them on there.

Q. If you came to a person that was not morally fit to serve what did you do?

A. Left him out.

Q. Suppose you came to a person that didn't have sufficient intelligence to serve as a juror what did you do?

A. I didn't take that too much in consideration. I felt that all I had to do was make the list and give it to the commissioners for them to pass on.



Q. Would the minutes of the board show what your instructions were about purging the jury box?

A. They didn't give me any instructions.

Q. Would anything show on the minutes?

Mr. Brogden: There is not anything in the minute book about it.

[fol. 59]. (Direct examination continued):

Q. You said you omitted some names. That is you didn't copy every name you found in the tax book?

A. No.

Q. You omitted some names?

A. Yes.

Q. I am trying to find the basis for your omission of those names?

A. The only think I know is just what I told the Judge here.

Q. And what was that?

A. That if a person was under age, or if I knew the man and something wrong with him I didn't put him down there.

Q. It wasn't a part of your duty to disqualify him on that ground?

A. Not that I know of.

Q. You know how many names on the book were persons twenty-one years of age?

A. I don't.

Q. Know how many names on the tax book?

A. I don't.

Q. Know how many names you omitted?

A. I don't.

Q. But you know you omitted some names?

A. I didn't copy every name.

Q. You have any idea how many names you had on the list?

A. I couldn't say.

[fol. 60] Q. Don't know whether ten thousand, or five thousand or twenty-five thousand?

A. No.

Q. Mr. Robinson, what did you do with the list you say you prepared for the jury commissioners?

A. When they gave it back to me I cut it up and put it in that box.

Q. That list you prepared did you prepare it in duplicate?

A. Did not.

Q. Just made one copy?

A. That is all.

Q. Tell me this, did you have any assistance in preparing this list you were going to give the county commissioners? Did anybody help you?

A. The lady who wrote the names on the typewriter.

Q. Who was she?

A. Lady in my office.

Q. One of your assistants?

A. Yes, sir.

Q. Did she write it in single or double space?

A. Either double or three spaces, I don't know which.

Gave room to cut them up.

Q. How many times did she type that list?

A. One time.

Q. You called it to her and she typed it one time?

[fol. 61] A. Yes, sir.

Q. What happened to that list when you got through with it?

A. I cut it up.

Q. You turned it over to the commissioners and then you got it back from the commissioners?

A. They gave it back to me.

Q. So the list you gave the commissioners contained the names of all persons you had got from the tax book?

A. Yes, sir.

Q. When you got through calling them off did you check them back?

A. No, sir.

Q. What was the condition of the list when you got it back from the commissioners? Had any names been added, deleted or written in between names?

A. Wasn't any written in that I know of.

Q. The list you got back from the commissioners was the same list you gave them?

A. Same list.

Q. Had any been added?

A. No.

Q. Any stricken?

A. May have been some marked out.

Q. Do you think there were?

A. I think so but I am not positive.

[fol. 62] The Court: Substantially the list that came back to you was the same list you had prepared?

A. Yes, sir.

Q. And every name on there was taken from the tax list?

A. Yes.

Q. You say when you got that list back you cut it up and put it in the jury box?

A. That's right.

Q. Did you retype the list?

A. I did not.

Q. The original list you got back and cut up and put in box No. 1 do you know what procedure the commissioners followed in determining whose name should stay on that list?

A. I don't know.

Q. And you didn't go to any other source beyond the tax book in determining who would be on that list of yours?

A. No.

Q. Mr. Robinson, how long have you been engaged in the work of preparing the jury list for county commissioners?

The Court: He told you since 1930.

Q. And that has been true in your case for twenty years?

A. December 30th.

Q. Did you follow the same procedure as you followed in other cases?

A. Yes.

[fol. 63] Q. In your twenty years as clerk to the board of county commissioners of your own knowledge how many negroes have you known to be called for jury service?

A. I don't know.

The Court: Give him the best estimate you can? Do you know of any?

A. I don't know of any.

Q. Know of any negro who has ever been called for grand jury or petit jury in Vance County?

A. Since when?

Q. In the twenty years you have been clerk to the board you haven't known any to serve on the jury?

A. I have.

Q. Prior to the calling of this special venire in 1949?

A. I don't recall.

Objection by respondent overruled. Respondent excepts.

Q. You did attend a majority of meetings at which jurors were drawn?

A. Yes.

Q. You wrote the names down that they gave you?

A. I did.

Q. Those names you wrote down, what names were they?

A. Names drawn from the jury box.

Q. Wrote them as persons drawn by jury commissioners?

A. Not then but when I wrote up the minutes.

[fol. 64] Q. Names were written in there who were drawn by jury commissioners to serve as jurors at various terms of court?

A. Yes.

The Court: How many negroes were on the panel in this particular case, jurors who were drawn to go down to Windsor and act as jurors in this case?

A. Six or seven, or seven or eight. I don't know exactly.

The Court: It is proposed to draw the names from the jury box, one by one, and have it determined whether that particular name is on the tax book and if so whether that name is with the negroes or whites.

The respondent enters a general objection to each and every question with regard to all the evidence introduced.

The Court: Mr. Robinson, will you take a chair by that table on which is the jury box.

The jury box is opened.

The Court: Gentlemen representing the respondent, I am assuming that each side will make a list as we go along. The names are now being called from No. 2 jury box.

(Note: At the continued hearing of this case on January 23, 1951 it was stipulated that it would not be necessary for



the reporter to include the entire list of names but that the names of negroes drawn from box No. 2, forty-one in number, be incorporated in the record, and was stipulated that that list be made alphabetically.) See Page 104.

The following is an alphabetical list of names of negroes drawn from jury box No. 2:

Name	Township
1. Adams, J. B.	1
2. Boyd, Cyrus	6
3. Brooks, W. T.	3
4. Brown, Mollie	7
5. Bullock, E. A.	1
6. Bullock, Moses M.	5
7. Christmas, Walter	3
8. Cousins, William, Sr.	6
9. Crews, William	6
10. Crudup, John	1
11. Cunningham, Maggie	2
12. Davis, Walter	7
13. Eaton, Lucy A.	1
14. Eaton, Sallie A.	1
15. Edwards, Frank	3
16. Evans, Johnny	5
17. Evans, Louis	1
18. Fogg, William	7
19. Hanks, Beulah	3
20. Hawkins, Robert	7
[fol. 66] 21. Henderson, Edward	6
22. Henderson, J. A.	4
23. Henderson, James	5
24. Hunt, Johnny Bell	2
25. Jackson, Thaddeus	1
26. Jones, Pompey J.	1
27. Lewis, Clara	6
28. Massenburg, Early	7
29. Parkam, S. C.	1
30. Paschal, William	5
31. Peebles, W. H.	1
32. Plummer, Chesley	5
33. Pool, Marion	1

Name	Township
34. Reed, Phil E.	6
35. Revis, Edward L.	1
36. Vincent, Moses	7
37. Walker, T. J.	5
38. Williams, Jr. Robert	5
39. Wilson, Josephine	7
40. Wimberly, R. E.	1
41. Wyche, Oliver	1

[fol. 67] D. P. McDuffy, having been first duly sworn, testified in behalf of the respondent as follows:

Direct examination.

By Mr. Rhodes:

Q. Mr. McDuffy, I believe you are Chairman of the Board of Elections for Vance County?

A. Yes, sir.

Q. How long have you been chairman?

A. Six years with the exception of from May, 1948 until the following June.

Q. Were you chairman of the board of elections of Vance County at the time that the jury list was prepared for the box for 1949?

A. Yes.

Q. Did you have the registration books in your custody at that time?

A. Yes.

Q. Did you during that period of time turn the registration books over to any tax official or register of deeds of Vance County?

A. No, sir.

Q. Did they have access to those books for the purpose of copying them?

A. No, the law prohibits anything other than candidates.

Q. Where did you keep them?

A. I kept the old books, before the 1949 Legislature, in the vault of the Clerk of the Superior Court where the [fol. 68] statute provides it should be and no one has

access to those books except the Clerk, who is custodian. The 1949 Legislature placed them in custody of the Chairman of the Board.

Q. During 1949 you had the registration books in your custody?

A. Yes, sir.

The Court: So far as you know they were not used by any person for the purpose of getting names for jurors?

A. No, sir.

Q. Hear any talk about it?

A. No, sir.

Cross-examination of D. P. McDuffy.

By Mr. Taylor:

Q. You are Mr. Cooper?

A. McDuffy.

Q. When did you take over?

A. About six years ago and served until the primary two years ago, in 1948. Dropped out and stayed out two months and then came back.

Q. When did you go back as chairman of the board?

A. August of 1948.

Q. And during that interim Mr. Cooper was chairman?

A. Yes.

Q. You know whether or not your name is listed by the Secretary of State as chairman of the Board?

A. I don't know what he does but I communicate with the State Board.

[fol. 69] Q. You do know you were subpoenaed by the State?

A. The Marshal brought it to me along with the deputy sheriff knowing I was chairman at the time and in all probability I take it counsel got the information somewhere that J. C. Cooper was at that time and it simply hadn't been changed.

Q. I got it from the North Carolina State Manual for 1949.

A. I wrote you to that effect.

Q. How long a period of time did Mr. Cooper serve as chairman?

A. He served from June, 1948 until May, 1949 and resigned to run as Mayor of Henderson.

Q. You don't know whether this jury list was prepared before or after that?

A. I don't know when prepared but the registration books were in the vault of the clerk of the superior court and he was custodian of those. The county commissioners had nothing to do with it. No one except the chairman of the board of elections.

Q. When did you get those books into your personal possession, from the time you came back?

A. Immediately they were in my custody.

Q. That is in June, 1948?

A. Probably it was.

Q. I am trying to determine the year. Do you say it was 1948 or 1949?

[fol. 70] A. From June, 1948 until May, 1949 when Cooper was out.

Q. You got those books in your possession after June, 1949?

A. In my possession or Cooper's possession. Board of commissioners never had their hands on those books relative to selection of jury.

Q. You got possession after June, 1949?

A. Yes, sir.

Q. You don't know who had access to them prior to that time?

A. I know the clerk of the superior court was custodian.

Q. Of your personal knowledge you don't know who may have had access to them?

A. I didn't question the clerk of the court.

Q. To the best of your recollection you don't know who had access prior to the time you got them back in June, 1949?

A. I know the books are out yonder in the car now and I know they were in the vault of my county.

The Court: You don't know what happened while the clerk had them?

A. No, sir.

Q. Do you know anything about the preparation of the jury list?



A. No, sir.

Q. Are your registration books kept according to race?

A. Yes, every man's name is written on there and if he is white he is marked white and if he is colored he is marked colored and in that way I can tell you the number in the county, both white and colored, democrats and republicans. [fol. 71]

Q. You know how many registered voters in Vance County?

A. Yes, sir.

Q. How many?

A. There may be the least variation just before the general election because there is permissible dates for transfer of those qualified.

Q. As of June, 1949?

A. I can't tell you. This was a new registration in 1950.

Q. This list you have was made subsequent to June, 1949?

A. As a result of the 1949 Legislature we had a new registration in 1950. The last new registration was in 1946. Probably fifteen thousand on those books. Some moved away and died.

Q. I want to know if you know how many registered voters?

A. Usually vote five thousand. I would say probably sixty-five hundred on. We have the biggest registration now that we have ever had.

Q. Could you approximate of that number how many were colored?

A. I would say about the same proportion now, about 690 colored now and about 7000 white.

Q. And out of the total you have approximately 690 colored?

A. I can give you the exact number. We have 8000 now, 675 colored. About the same proportion is the way it runs.

Q. For how many years has that been true?

A. Well, that is dependent upon whether anybody gets re-elected in the primary, if they want a bunch of colored [fol. 72] people to vote for them, if somebody becomes active. Two years ago in one precinct in my county one or two people got pretty active around colored people and put a bunch on the books. When left alone in 1950 nothing

like that number came back to get on the book, I would say the 1943 had in all probability more colored people than in 1950.

Q. How many voting precincts you have?

A. Thirteen up until this past May. Dropped one and added two more.

Q. In 1949 you had thirteen?

A. Yes.

Re-direct examination of D. P. McDuffy.

By Mr. Rhodes:

Q. The 1949 tax list of course was for those people who listed their taxes in January, 1949. Now when they made up the jury list from the 1948 tax list did they at that time use your registration books in making up the list?

A. No, sir.

Q. You were in custody of the registration books in June, 1949?

A. Yes, sir.

Q. Did they use the registration books in 1949 in preparation of the jury list?

A. No, sir.

Mr. Rhodes: I would like for the record to show that counsel for petitioners did not subpoena Mr. McDuffy or any other election official.

[Fol. 73] The Court: The following records are im-  
pounded:

The jury boxes, No. 1 and No. 2;  
13 Registration books of Vance County 1940;  
Tax ledger 1948;  
Commissioners' minute book No. 90;  
Superior Court minute docket No. 23.

Court adjourned at 5:00 o'clock P.M. January 3, 1951, and  
re-convened at 10:00 o'clock A.M., January 4, 1951.

The petitioner is before the Court in person and by coun-  
sel.

The jury box No. 1 is opened and Mr. H. M. Robinson,  
Register of Deeds of Vance County, proceeds to call all the

names in said box: (By stipulation the court reporter is not to list the names.)

H. M. ROBINSON, recalled:

Direct Examination.

By Mr. Taylor (continued):

Q. Before we began the count of the scroll we were trying to determine the method you used in preparing jury list and you stated that you took the tax list and began with Henderson Township and went down the tax book and withdrew from the tax book names of certain people and put them on the list you proposed to give to the commissioners to draw jurors?

A. Put it on the list I gave to the commissioners.

Q. I understood you to say you excluded some people. [fol. 74] You didn't take every name you found on the list?

A. No, I don't think I took every name.

Q. I want to know on what basis you eliminated names you omitted as you went down to select the names. It has become pertinent that we know that.

A. I don't know that.

Q. All you know is you just took some names and some you didn't?

A. I didn't copy every name I don't think.

Q. Do you recall that you copied a majority of the names, or ninety percent, or eighty percent?

A. I don't know what percent.

Q. You can't approximate the percent?

A. No.

Questions by the Court:

Q. Were you told by anybody, commissioners or anyone, to select a certain number of names?

A. No, sir. Just told me to make a list of names from the book and present it to them.

Q. They didn't intimate or indicate to you how many names they wanted?

A. No, sir.

Q. Can you state to me now whether it is true that you

only selected the names of those persons that you knew or felt in your own mind were qualified to serve?

A. No, sir. I put some on there I didn't know.

[fol. 75] Q. How did you arrive at that?

A. Well, they had property there and I put them on there for the commissioners to decide whether or not they were fit for jury duty. I didn't try to decide on anybody.

Q. They wanted you to give them a list from which they could make up the list?

A. Yes, sir.

Q. You went through the tax book and generally speaking you took those persons who listed say above or more than the average property?

A. I got most of the real estate owners and majority of the ones that listed right much personal.

Q. Did that apply to both races?

A. Yes, sir.

Q. You didn't limit it entirely to real estate owners?

A. No, sir.

Q. When you got away from real estate you limited it to those who owned considerable personalty?

A. Yes, sir.

Q. Both white and negroes?

A. Yes, sir.

Direct examination:

By Mr. Taylor (continued):

Q. You didn't follow any definite system?

A. No more than I just told you. I just made a list for the commissioners.

[fol. 76] Q. In choosing the names you put down such names as you thought you should put on the list you were going to give them. I think that must be obvious if you had no particular basis for doing it. If you came to a particular name you put it down and if you didn't want to you didn't put it down.

A. I made the list just as I told the Judge.

Mr. Taylor: We are only interested in getting the total number of people on the tax book as appears as far as our percentage is concerned.



The Court: You have that privilege of developing what you want to and the respondent can do the same. Then the Court can get in what it thinks will be helpful.

Questions by the Court to the Witness Robinson:

Q. When you were looking over the list of the tax book did you notice any instances of corporations being listed?

A. Corporations in the front.

Q. They are not with the individual tax listers?

A. No, sir.

Q. You remember nothing any person who had moved from Vance County?

A. Some moved away and some died.

Q. When you made up the list you didn't put them on?

A. No, sir.

Q. You left them out?

A. I tried to.

[fol. 77] Examination by Mr. Taylor (continued):

Q. Can you recall how many such people there were?

A. I do not.

Q. Don't have any idea how many you came across?

A. No.

Q. Would you say as much as fifteen or twenty-five?

A. I wouldn't say any number because I don't know.

Q. You don't know that you eliminated any on that basis?

A. If I saw any I did.

Q. Do you recall whether you saw any?

A. I don't know about it.

Q. Did you know Reverend T. J. Walker?

A. I did.

Q. You know he is dead?

A. Yes.

Q. Explain how his name got in the jury box. Did you know he was dead in 1948?

A. I don't know whether he was or not.

The jury boxes No. 1 and No. 2 are delivered to Mr. H. M. Robinson, Register of Deeds;

The county commissioners' minute book and the election books are delivered to Mr. D. P. McDuffy;

The Superior Court Minute Docket and the tax book are delivered to Mr. H. M. Robinson; Register of Deeds.

The hearing of this case is continued until Tuesday, January 23, 1951:

[fol. 78] The hearing of this case was resumed on Tuesday, January 23, 1951.

The petitioner is before the Court in person and by counsel.

The Warden, Mr. J. P. Crawford, is represented by J. E. Lowery, Guard, and S. B. O'Neal, Transfer Officer.

All counsel as appear of record were present.

H. M. ROBINSON, recalled.

Cross-examination.

By Mr. Peters:

Q. When you were on the stand before I understood you to say that the names that went in the jury box were taken from the tax book?

A. Yes, sir.

Q. Were any of them taken from any other source?

A. No, sir, not that I know of.

Q. Did you testify before as to the number of names on the tax book?

A. I don't think so.

Q. Mr. Robinson, I understood you to testify on your direct examination that in making up the jury list from the tax book you used only the names of those who owned real estate and/or considerable personal property? Is that correct?

A. I don't think it is left entirely to that. I made the list from the tax book and turned it over to the commissioners.

[fol. 79] The Court: What criterion or standard did you use in selecting the names that you put on this list? You didn't put them all?

A. No, sir.

Q. Which ones did you put on?

A. Mainly the ones that owned property.

Mr. Peters continues:

Q. In putting on the names of those who owned property did you put on the names of white payers that owned property?

A. Yes, sir.

Q. And the names of colored payers that owned property?

A. Yes, sir.

Q. Did you make any distinction between white people and colored people that owned property?

A. No, sir.

Q. You omitted those whom you knew to be under twenty-one?

A. Yes, sir.

Q. And those you knew to have something wrong with them, either old age or mentally wrong?

A. Yes, and I didn't put a preacher on there if I recognized him.

Q. Why?

A. I understood they were not supposed to serve on the jury.

Q. Exempted by statute?

A. Yes, sir.

[fol. 80] Q. That applied to both white and negro preachers?

A. Yes, sir.

The Court: You didn't put any doctors on there?

A. I didn't intend to.

Q. You didn't put any lawyers on there?

A. No, sir.

Q. How about firemen?

A. I don't know about that.

Q. Were there any others you didn't put on the list because you knew or thought they would be excused by statute?

A. Not that I know of.

Q. I am asking you now in regard to the list you made up and not as to the list finally approved by the commissioners. Were any names left off because of lack of good moral character?

A. No. I didn't consider that.

Mr. Taylor: I have tried to get from Mr. Robinson the definite method he followed. I understood him to say on the

last examination he simply took those who had right much property and that was his only basis. I am interested in the mechanics he used.

The Court: I suggest you ask him such questions as would clarify it.

Redirect examination.

By Mr. Taylor:

Q. Mr. Robinson, you testified you don't know how many names on the tax book?

A. I don't know how many.

[fol. 81] Q. I think you will find when this compilation is through that there are about eight thousand names. You know from our examination of the jury boxes the last time that there were some two thousand names in the jury boxes.

A. I don't know how many.

Q. The record will show that. We will stipulate to the fact that there are some eight thousand names in the tax book and two thousand in the jury box. I am interested to know how you eliminated the other six thousand?

A. I didn't eliminate them. I simply made a list and turned — over to the commissioners and the list they turned back to me I cut up and put in the jury box.

Q. How did you arrive at them?

A. I made a list and turned it over to the commissioners.

Q. It's obvious that you eliminated six thousand names?

A. I told you I didn't eliminate them.

The Court: If you selected two thousand out of eight thousand you failed to put six thousand in there. What he wants to know is how did you go about selecting the two thousand you put in there.

A. I just made a list.

Q. Did you undertake to put down those you knew personally.

A. No, sir. I went down the list and got the ones with property and turned — over to the commissioners for their approval. They went over it and gave it back to me and told me to cut it and put it in the jury box and I did.



[fol. 82] Questions by Mr. Taylor, resumed:

Q. Did you have instructions as to the number of names in the jury box?

A. No, sir.

Q. Did you start out by setting up a certain number?

A. No, sir, I just went through the book and got the names and shut it up and carried the list to the commissioners the first Monday and glad to get rid of it.

The Court: You had no standard to go by. You have eight thousand names on the tax book. That is eight thousand people owning property and paying taxes on it. You went through that book having eight thousand names and put two thousand in the box. You say you didn't stop simply because you had a sufficient number because you said you didn't know how many you had?

A. No, sir, I didn't have any idea how many I had.

Q. You told me you didn't just put those you knew personally but put those who owned considerable real estate or personal property?

A. Yes, sir.

Q. What counsel would like to know and what I would like to know is why were there only two thousand when you got through?

A. Well, I don't know.

Mr. Peters: There is no definite information that there were two thousand when he got through with them but [fol. 83] there were two thousand when the commissioners got through with them.

The Court: I would be safe in saying that the list he prepared was what went in there. I will assume that the list he prepared was probably or substantially the list of jurors that went in the box.

Mr. Rhodes: The names on tax list doesn't always list taxpayers because a large number just list poll tax. You are trying to say he has eight thousand names on the tax list and therefore Mr. Robinson eliminated a large number of taxpayers. He says he took the names of property owners, either real or personal property. I would assume a large number of the eight thousand names just listed for polls.

Mr. Taylor: I don't think the statute says eliminate the ones that pay poll tax.

The Court: We are not interested in the statute now but there were six thousand excluded. Mr. Rhodes says it doesn't mean six thousand who paid taxes on property. Mr. Robinson's statement was that he put on there property owners. That would mean he left out those who paid poll tax.

Mr. Brogden: There is no necessity of putting every tax payer in the box. I don't think the law requires you to double up and put everybody in there if you have a number that is sufficient.

[fol. 84] Mr. Taylor: I want to know on what basis he eliminated the six thousand. I will accept what he says.

Q. Mr. Robinson, counsel for respondent suggested that in picking these names from the tax book that you eliminated certain people on account of lack of character and insufficient intelligence.

A. Not that I knew of.

Q. You didn't exclude anybody on account of lack of sufficient intelligence and lack of character?

A. I didn't have anything to do with that.

Q. Did you have instructions from the commissioners?

A. Instructed me to make a list and bring it at the next meeting.

Q. Tell you where to get that list?

A. Tax book.

Q. Specify what tax book?

A. I don't know whether they said go to the tax book but that is the way it has been done since I have been there.

Q. You had done it before?

A. Yes.

Q. You know the population of Vance County?

A. Yes.

Q. What is it?

A. A little over thirty thousand.

Q. The figures will show about eight thousand people on [fol. 85] the tax book. That leaves twenty two thousand in Vance County who are not on the tax book.

The Court: That is a matter for calculation.

Q. Those people whose names are not on the tax book you didn't deem it necessary to go to other sources to get persons for jury service?

A. Didn't have anywhere to go to.

Q. You are aware of the fact that voting registration books are kept in the county?

A. Yes.

Q. You didn't resort to those?

A. No.

Q. You went to no other source other than the tax book?

A. I did not.

Q. Have you been register of deeds for eighteen or nineteen years?

A. Yes.

Q. Prior to the calling of the special venire in July, 1949 to sit in this case had you ever known a negro to be called for jury duty in Vance County?

A. I don't know.

Q. To the best of your recollection?

A. I don't know whether one had been called or not.

Q. Your office is in the courthouse building?

A. It is.

[fol. 86] Q. I ask you if it is not common knowledge that prior to the calling of this special venire in July, 1949 no negro has served on grand jury or any jury in Vance County for the past forty years?

Objection by Respondent overruled.

A. I don't know of my own certain knowledge.

Q. I ask you if it is not generally known that negroes have not served on juries in Vance County for the last thirty or forty years?

Objection by Respondent overruled.

A. What is the question?

Q. Is it not generally known in Vance County that negroes had not served on juries in Vance County prior to the calling of this special venire for the last thirty or forty years?

A. I have no knowledge of that.

That is all.

Recross examination of H. M. Robinson.

By Mr. Peters:

Q. Mr. Robinson, do you know whether or not any negroes have served on the jury, either grand or petit jury, since this box was drawn in 1949?

A. Some served the last term of court.

Q. Know how many?

A. No, sir.

Q. What do you mean by last court?

A. January, 1951.

[fol. 87] Q. How about 1950?

A. One served in October. I happened to know the man.

Q. You know whether he served on the grand jury or petit jury?

A. One on the grand jury, William Crews.

Q. You know of any others that served in 1950?

A. Phil Reed served in one court. I wouldn't say which it was.

Q. How about 1949, after this jury box was prepared in July, 1949 any negroes serve on the grand or petit in 1949?

A. I wouldn't say definitely.

Q. You are register of deeds?

A. Yes, sir.

Q. Does your job require your presence in the court room?

A. No, sir.

Q. You have occasion to go to the courtroom?

A. Very seldom. Just for curiosity.

The Court: Do you attend the calling of a special venire?

A. Sometime and sometime I don't.

Q. Either you go or you send a deputy?

A. Yes, sir.

Q. You remember whether you were in the courtroom when this venire was drawn?

A. That was drawn in my office but I was not present.

Q. Do you know whether or not there are any negroes on the grand jury at the present time?

A. I do not.



[fol. 88] Re-redirect examination:

Q. How many negroes do you say have been called for jury duty since July, 1949, aside from the special venire?

A. I don't know. I know those called by name because I know them personally.

Q. What is the total of those?

A. Two or three.

Q. You know how many jurors have been called altogether during that time?

A. I don't. Don't call the same number each time.

Q. Would your records show that?

A. They would.

Q. You have your minute book here?

A. It's here somewhere.

Mr. Brogden: Where you would go to get that would be the Clerk's minute book.

Mr. Taylor: I want to see what his book shows.

The Court. Do you have your book?

The Witness: Yes, sir.

The Court: Look and see.

Q. What was the first court held in Vance County after July, 1949?

A. October.

Q. Tell us how many jurors were drawn for that term of court?

A. Fifty-four for the first week, twenty-nine for the second.

[fol. 89] Q. Do you have any knowledge of how many of those were negroes?

A. No, I don't know.

The Court: You said you knew William Crews?

Mr. Brogden: That was October, 1950.

Q. Would you recognize the names if you saw any of them that you knew?

A. I might.

Q. Would you look and see if you recognize the names of any negroes?

A. I don't know whether they are colored or not.

Q. You don't recognize any of them as colored?

A. No.

Q. From drawing the slips from the jury box you recognize the names of seventy-five percent of the people, white and colored?

A. Good many of them.

Q. What is the next term of court?

A. January.

Q. How many jurors and do you know whether any of them were colored?

A. Fifty.

Q. How many of those were negroes?

A. I don't know. John Crudup and we have a white and colored one.

Q. What township is he in?

[fol. 90] A. Both in Henderson No. 1.

Q. What is the one you have there?

A. Henderson No. 1.

Q. What is the next term of court?

A. March, two weeks. Forty-eight for the first week, thirty-seven for the second.

Q. Do you recognize any of those names as being names of negroes?

A. I think some of them are colored.

Q. Which ones?

A. Clarence Green, from Henderson No. 1, and Beulah Hanks 8.

Q. What is the next term of court?

A. June. Thirty-six the first week, twenty-four the second.

Q. How many of those are negroes?

A. I don't know.

Q. Do you recognize the names of any of them as being negroes?

A. I do not.

Q. What is the next term of court?

A. October.

Q. How many jurors?

A. Fifty-five the first week, twenty-five the second.

Q. You recognize the names of any of those as being negroes?

A. William Crews, Township 6, is colored, Thad Jackson, Township 1 is colored.

[fol. 91] Q. What is the next term of court?

A. January of this year.

Q. How many jurors drawn for that term?

A. Seventy-two.

Q. How many of those were negroes?

A. Cyrus Boyd, Township 6, is colored; Phil Reed, No. 6, is colored; Robert Hawkins, No. 1, is colored I think. The only Robert Hawkins I know is colored. I don't know a Robert Hawkins white.

Q. You say you know most of the people in the county?

A. Yes. R. H. Wimberly No. 1 is colored. That is the last court.

The witness H. M. Robinson is excused.

F. H. ELLINGTON, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Taylor:

Q. You are chairman of the Board of commissioners?

A. Yes.

Q. How long have you held that office?

A. This is the second term.

Q. When did you go in?

A. Three years ago this past December.

Q. You have been chairman for three years?

A. No. Served one term as chairman and started the second one.

Q. As one of the members of the board it is your duty to participate in the selection of persons selected for jury service in Vance County?

[fol. 92] A. Yes.

Q. Do you recall the purge of the jury box in the summer of 1949?

A. Yes, my first experience.

Q. When was that jury box purged?

A. July.

Q. Tell us the mechanics of it.

The Court: How did you do it?

A. The register of deeds brought us a list of names printed on paper and it was handed to the entire board. We went over it.

Q. Were you the chairman then?

A. Yes, sir.

Q. Do you recall whether or not your board gave the clerk or register of deeds any instructions on how to prepare this list?

A. No, I don't recall.

Q. State what happened?

A. It was the customary rule, I suppose, to bring the names in. That was the way it was done. Each commissioner went over it. The Commissioners taken the list and went over it in a body at a meeting.

Q. You represent any particular township?

A. Yes.

Q. Give me the names?

A. Nutbush, Middleburg and Sandy Creek.

Q. You got a list from the register of deeds?

A. Yes, sir.

[fol. 93] Q. What did the commissioners do with it?

A. Looked the list over and went through it.

Q. Did you approve the list at that time?

A. Yes, some of them.

Q. How many did you approve?

A. I don't remember.

Q. You know how many you eliminated?

A. No, I don't.

Q. You have any idea how many you eliminated?

A. No, sir.

Q. Have any idea how many the clerk to the board brought in to the meeting?

A. No.

Q. How many did you strike off?

A. I don't remember but some were struck off.

Q. Were there ten, fifteen or a hundred?

A. I don't imagine over ten or fifteen.

Q. You didn't strike over ten or fifteen?

A. Didn't strike that many.



Q. The whole board didn't strike more than ten or fifteen?

A. It was passed around to each member and each man who knew a person not capable of sitting on the jury marked through it.

Q. What did you do about those you didn't know?

A. Didn't do anything.

Q. Left them on?

A. Absolutely.

[fol. 94] Q. What did you do after that?

A. That was all. The list was turned back to the register of deeds as clerk to the board.

Q. About how long a time did the board spend in considering that list?

A. From forty-five minutes to an hour.

Q. How long was your meeting?

A. I don't remember that particular date. We met at ten o'clock and got through by lunch. A lot of times we have to go back.

Q. You spent about forty-five minutes or an hour looking over the list?

A. Something like that.

#### Question by the Court:

Q. What do they pay the county commissioners of Vance County?

A. The chairman gets a hundred dollars a month and the additional four members get twenty-five.

Q. Regardless of how many meetings?

A. Yes, sir.

(Questions by Mr. Taylor continued.)

Q. What did you do with this list after it was completed by the board?

A. Turned it back to the Register of Deeds.

Q. You ever see it again?

A. No.

Q. You know what happened to it?

A. No.

[fol. 95] Q. How many copies of the list did you have?

A. I don't know. It must have been as many as five.

Q. Were there carbon copies or all originals?

A. There were original—

Q. You mean printed five times?

A. It was printed on four or five papers—

Q. You had one list with five or six sheets?

A. That's right.

Q. You didn't have five copies?

A. I wouldn't think so.

Q. Did you get the names of people in your district?

A. No, I got them and others to. The other men went through the list I had.

Q. And the ones you knew personally and the others knew personally you left them there or struck them out?

A. Lot of them I didn't know. One on there we did know and incapable of sitting on the jury he was marked through.

Q. It was based on what the commissioners knew of the people?

A. That's right.

Q. I think you said after the sheets left that meeting you never saw them again?

A. That's right.

Q. You don't know of your own knowledge how many were put in the box?

A. No.

[fol. 96] The Court: You remember how many you struck?

A. No, sir.

Q. Did you strike off any negroes?

A. Not to my knowledge.

Q. Did you strike off any person's name because of his race?

A. No, sir.

Q. You say you don't recall how many names the register of deeds brought to the meeting?

A. No, I don't.

Q. Did you or any other member of the commissioners inquire as to the source of the names?

A. No.

Q. You don't know where he got the names?

A. No, sir.

Q. Don't know how many he included?

A. No.

Q. And you made no inquiry?

A. No.

Q. And you don't know of your own knowledge whether the names you gave back to the clerk were the names that went in the box?

A. No.

Q. Mr. Ellington, you stated the box was purged in July, 1949?

A. Yes.

Q. Tell what you did in purging it, or what constituted that purge.

[fol. 97] A. Just what I told you. The register of deeds brought the names in there. It was made up and he was instructed to put them in the box, take the old names and do away with them and put the new names in the box. He was entrusted for years before that to do that and I think what he did was right.

Q. You didn't see him do that?

A. I did not.

Q. How long you lived in Vance County?

A. Thirty three years.

Q. What sort of business are you in?

A. I try to farm.

Q. Prior to the calling of this special venire in 1949 to serve in this case had you ever known a negro to serve on a jury in Vance County?

A. Not to my knowledge.

Q. I ask you is it not more or less common knowledge in Vance County that no negro has served on juries prior to this time?

A. Not to my knowledge.

Q. Isn't it the general reputation in Vance County that prior to the calling of this special venire negroes had not served on juries in Vance County for the last thirty or forty years?

A. Yes.

No further questions.

[fol. 98] Cross-examination of F. H. Ellington.

By Mr. Rhodes:

Q. Mr. Ellington, Mr. Robinson is clerk to your board of county commissioners?

A. Yes, sir.

Q. When you got ready to purge this box you requested him to furnish you or the board of county commissioners with a list from which the board of county commissioners selected the names to go in the box?

A. Yes, sir.

Q. You know for how many years he has been doing this?

A. No, sir, I don't. Mr. Robinson has been register of deeds for quite a while.

Q. When he brought the list in to you you took the list and went around to each commissioner and each commissioner checked the list?

A. Yes, sir.

Q. And then when the list had been checked it was then turned back to Mr. Robinson with instruction to place those names in the jury box?

Objection by Petitioner.

Q. After the list had been checked by the board of county Commissioners I ask you what instructions, if any, you gave to Mr. Robinson as to what he was to do with those names?

A. I don't remember the exact words but it was understood he would cut them up in strips and put them in the box.

[fol. 99] Q. Did you instruct him to put them in the box?

A. Yes, sir.

Q. Then the first list drawn out of that box after it was purged was at the trial of this case?

A. I don't know. I wasn't present.

Q. Were you present at the selection of the special venire to go to Bertie County?

A. No, sir.

The Court: When was it drawn?

A. August, 1949.



Mr. Brogden: That was the first list drawn out of the box.

Q. Were you present at the hearing in Bertie County?

A. Yes, sir.

Q. I ask you whether or not you knew of any dots which appeared on the names of any list prior to the time they were drawn out of the jury box in Vance County?

A. No, sir.

Q. Did you put any dots before or after the name of any person?

A. No, sir.

Q. See any member of the board of county commissioners do that?

A. No, sir.

Q. In the selection of the names which went in the jury box state whether or not any consideration was given as to whether that person was a negro or a white person?

A. No, sir.

[fol. 100] Q. State whether or not you had any way of knowing whether or not names put in the box or taken out of the box were either negroes or white except your personal knowledge of the man?

A. No, sir, that was the only way I could identify them.

Q. What was the basis of the selection of the names that went in the box? What did you take into consideration?

A. Well, a man's reputation, whether I knew him, or whether I knew the man guilty of being in court a lot, or physically handicapped. Of course some of them might have been put in like that but if so I didn't know the man.

Q. Do you know whether or not any negroes have served on the juries in Vance County since July, 1949?

A. Yes, sir, they have.

Q. You recall what their names were?

A. There is one particular name, Mose Vincent.

Q. You know whether or not there are any negroes serving on the grand jury in Vance County now?

A. The grand jury was made up for this last January Term of court and I was not present and don't know.

Q. Were any negroes serving on the grand jury prior to 1951?

A. I couldn't say.

Q. Do you have occasion to go in the courtroom during the trial of cases very often?

A. Not very often unless some cause to go.

Q. When you go in the courtroom do you make any special [fol. 101] observance as to who is sitting on the jury?

A. No, sir.

Q. Mr. Ellington, you are not in position to say there are not as many as three negroes serving on the grand jury in Vance County?

A. No, I wouldn't say because I don't know.

Mr. Brogden: That have served out of this particular box?

A. I don't know.

Q. You know of any effort having been made in Vance County to discriminate between negroes and whites in placing names in the jury box?

A. No, sir.

Q. Has the question ever been discussed before the board of commissioners as to whether a man is negro or white, or to throw it out?

A. No, sir.

Redirect examination of F. H. Ellington.

By Mr. Taylor:

Q. Mr. Ellington, you stated in answer to Mr. Rhodes that you didn't know of any effort made to discriminate against negroes in inclusion of persons in the jury box?

A. No, they have not.

Q. How do you account for the fact that they have not been put in there before?

A. I don't know.

Q. You don't know how many names the register of deeds brought in?

[fol. 102] A. No.

Q. You wouldn't think eight thousand?

A. No.

Q. You wouldn't think five thousand?

A. No, I would not.

Q. What is your best estimate of the number of names he brought in at this meeting?

A. Possibly thirty-five hundred.

Q. Do you know the approximate population of Vance County?

A. Thirty one or two thousand, thirty odd thousand.

Q. Did the board make any effort to find out how he arrived at thirty five hundred odd names?

A. No.

Q. The board just accepted what he brought in?

A. Yes.

Q. The board made no effort to find out whether persons beside what he brought in should have been put on?

A. No.

Q. You stated you had no way of knowing whether a white or colored person on the jury scroll?

A. No.

Q. You stated in answer to Mr. Rhodes question you didn't know anything about the dots on the ~~26~~?

A. Never heard of it.

Q. When did you first have knowledge of it?

A. Down in Bertie.

Q. Did you notice any periods or dots on the slips he [fol. 103] brought to you?

A. No, sir.

Q. You know whether any on there?

A. No.

Q. You don't know whether the scrolls in the jury box were the names of the list you got?

A. Look like the same.

Q. If a dot or period was there, and that has been established as a fact, you don't know how they got on there or who put them on there?

A. No.

Q. You were present in court here about two weeks ago?

A. I was here one morning.

Q. You were present at the trial in Bertie County?

A. Yes, sir.

Q. You know it was established that dots were by the names of colored people on that scroll?

A. Some of them.

Q. You were not present when we drew the names in this court?

A. No.

Recross-examination of F. H. Ellington.

By Mr. Rhodes:

Q. Did you see any dots on the list when you went over it?

A. If I did I didn't pay any attention to them.

Q. You looked at the names on the list?

A. Yes.

[fol. 104] Q. And at the time you were preparing them to be put in the jury box did you see any dot before or after the names of the persons?

A. No, sir.

Q. Did you ever discuss with Mr. Robinson, the clerk to the board, the matter of placing only names of white people on the list of names to be submitted to the board of county commissioners?

A. No, sir.

Q. Did you instruct him to put any dots on the name, before or after?

A. No, sir.

Q. Did you ever suggest to Mr. Robinson to use any means or method to enable the board of county commissioners to know whether a man was white or black?

A. No, sir.

3 Redirect examination.

By Mr. Taylor:

Q. How do you account for the fact that names of all the negroes had dots after them and none after the whites?

A. I don't know that.

Q. The record shows that. Can you account for it?

A. No.

Q. The board left it up to the discretion of Mr. Robinson how to do it?

A. Yes.

No further questions.



[fol. 165] Recross-examination.

By Mr. Rhodes:

Q. You testified that you received a salary of a hundred dollars a month as chairman of the board?

A. Yes, sir.

Q. How long have you received that?

A. Twelve months the first of last December. Going in thirteen months.

Q. You didn't receive it at the time the jury box was drawn up?

A. No, sir.

The Court: What did you receive before you received a hundred dollars a month?

A. Twenty-five dollars a month.

Q. When you got to be chairman you got a hundred?

A. Yes, sir and I was made chairman in December, 1949. I reckon it was.

MARK WOODLIEF, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Taylor:

Q. What official capacity do you hold in Vance County?

A. Member of the board of commissioners.

Q. How long have you held that position?

A. This is the third year.

Q. You hold any other public office in Vance County?

A. No, sir.

[fol. 106] Q. As a member of the board of commissioners of Vance County it is your duty to take care of the matter of calling persons for jury duty in the county assisting your co-members in the preparation of the jury list?

A. That's right.

Q. Do you recall the alleged purge of July, 1949?

A. I think so.

Q. Can you go on and tell us just what took place in that purge?

A. Had a new list of jurors, looked over them and approved of them and gave them to Mr. Robinson and told him to take further charge of them.

Q. What did you do in approving of them?

A. To see if any of them dead, or insufficient to be on the jury so far as we knew them.

Q. How long a period of time did you use to determine that at your meeting?

A. I couldn't hardly say. Sometime longer than others.

Q. At this particular meeting?

A. I would say about an hour.

Q. How many names did you strike from the list, if any?

A. I don't remember striking any.

Q. What townships did you represent?

A. Kittrell and Watkins.

Q. Is that all you did with respect to that purge?

[fol. 107] A. That's right.

Q. You have no idea how many names were on the sheets?

A. No, I don't.

Q. You can't approximate it?

A. No, I didn't count them.

Q. You don't know whether two thousand, four thousand or five thousand?

A. No.

Q. Did you or any other member of the board make any inquiry of the register of deeds whether he had included all persons that should have been included?

A. No, I didn't ask him.

Q. Just left it to his discretion?

A. Yes.

Q. When you got through inspecting the list you returned it to the register of deeds?

A. That's right.

Q. You know of your own knowledge what he did with it?

A. No.

Q. You haven't seen it since?

A. No, not unless it is after it was in the box.

Q. You yourself didn't have anything to do with it?

A. No.

Q. You say you didn't see the slip again until after it was in the box?

A. I said I hadn't seen it unless it was in the box.  
[fol. 108] Q. You don't know what happened to it?

A. No.

Q. How long have you lived in Vance County?

A. All my life.

Q. How long is that?

A. Fifty four years this coming March.

Q. Prior to the drawing of this special venire in 1949 had you ever known a negro to serve on a jury in Vance County?

A. There are reports—

Q. Of your own knowledge?

A. No, I have not.

Q. Is it not more or less common knowledge that in Vance County prior to the drawing of this special venire negroes had not served on the jury in Vance County for thirty or forty years?

A. I don't know how long.

Q. But it is common knowledge a long time?

A. That's right.

### Cross-examination of Mark Woodlief.

By Mr. Rhodes:

Q. This list was brought by Mr. Robinson according to the instructions of the board of county commissioners?

A. Yes, sir.

Q. Brought to the board and the board checked the list?

A. That's right.

[fol. 109] Q. At that time was there anything on the list which would indicate to you whether a man was a negro or white man?

A. No, sir.

Q. Was the question discussed at that time as to whether or not any particular person was negro or white man?

A. No, sir, or I didn't know it.

Q. Was the race question raised in the purging of this box?

A. No, sir.

Q. When you looked over this list did you see the dots before or after the names of any persons?

A. I didn't see any dots.

Q. If there were any dots upon that list at the time submitted to the board did it indicate to you as to whether or not the person before or after whose name it appeared was a negro or white man?

A. No, sir, I wouldn't have known the difference. I just knew the man.

Q. I will ask you to state whether or not the county commissioners of Vance County in purging the jury placed in box No. 1 the names of all persons whom the board determined to be residents and taxpayers of Vance County who had paid their taxes for the preceding year and were of good moral character and sufficient intelligence irrespective of race?

[fol. 110] The Court: His question was did you do that without regard to whether a person was white or colored?

A. Yes, sir, put them all in.

Q. To your knowledge was the name of any negro eliminated from the list submitted to the board?

A. No, sir.

Q. You stated that the list was turned back to Mr. Robinson with instructions that he place those names in the jury box?

A. Yes, sir.

Q. Do you know whether or not there are any negroes serving on the grand jury in Vance County now whose names were drawn from this box?

A. No. The only way I have of knowing is seeing the names in the papers drawn for jury. If I happen to know him I knew whether he was white or colored.

Q. Have you been in the courtroom in criminal term of court?

A. Not unless I was a witness.

Q. You don't know of your own knowledge whether any negro has ever served on any jury before or after this box?

A. Yes, I know some but I can't recall their names. Just seeing it in the papers.

Q. But you haven't seen them either before or since?

A. No, sir.



Q. And therefore if there were negroes who served on the jury since the 1949 box you have no more knowledge [fol. 111] about that than you did the lack of negroes who served prior to the 1949 box?

A. No, sir.

Re-direct examination of Mark Woodlief.

By Mr. Taylor:

Q. The truth of the matter is that in this so-called 1949 purge the commissioners left the mechanics up to the register of deeds as they had prior thereto?

A. Yes, sir.

Q. You didn't give him specific instructions how he should do it?

A. No.

Q. Didn't inquire of him to what source he went to get the names?

A. Yes.

Q. And passed on them?

A. Yes.

W. H. BLACKNALL, having been first duly sworn, testified as follows:

Direct-examination.

By Mr. Taylor:

Q. What official capacity do you hold with Vance County?

A. Board of county commissioners.

Q. How long have you held that position?

A. This is the second term.

The Court: Four year term?

A. Two year term.

[fol. 112] Q. You were a member of the board in July, 1949?

A. Yes.

Q. You recall the meeting at which the alleged purge of this box took place?

A. Yes.

Q. Describe what was done by the commissioners.

A. Mr. Robinson brought the list in. He was instructed to bring the list in from the tax book and he did and we looked it over and gave it back to him.

Q. How much time did you spend in looking it over?

A. I don't remember but I expect about an hour.

Q. Have any idea how many names on the list?

A. No.

Q. You can't approximate the number?

A. No.

Q. Don't know whether five, ten or fifteen thousand?

A. I wouldn't say fifteen thousand.

Q. Would you say three thousand?

A. I told you I didn't know.

Q. When you looked over the list what basis did you use, if any, in determining whose name would go in the box and whose would not?

A. If we knew one was not qualified we struck it out. Each commissioner looked the list over and if a name we knew not qualified we struck it out.

Q. Your purge was based on your personal knowledge? [fol. 113] You didn't seek any outside information from anybody?

A. No.

Q. How many lists did you have?

A. One list of the names. I don't remember how many sheets.

Q. You know whether these sheets were arranged according to townships?

A. I don't think so.

Q. Just one whole list of names?

A. Yes.

Q. Arranged according to race?

A. No, taken from the tax book.

Q. You know the tax book is arranged according to race?

A. Yes.

Q. You don't know whether he followed the setup in the tax book?

A. No.

Q. All you recall is you had one list of several sheets?

A. Yes.

Q. Know whether you had more than one alphabetical list, that is from A to Z twice?

A. I don't recall.

Q. After you looked over the list for the period of an hour you returned it to the register of deeds?

A. Yes.

Q. You know of your own personal knowledge what he did with it?

A. No.

[fol. 114] Q. You haven't seen it since?

A. No.

Q. How many names, if any, did you strike off of the list?

A. I don't remember. Maybe two or three.

Q. You recall whether white or colored?

A. No, I don't.

Q. How long have you lived in Vance County?

A. About forty years.

Q. Prior to the calling of this special venire had you of your personal knowledge ever known a negro to serve on the jury in Vance County for the last thirty or forty years?

A. I don't remember.

Q. Have you ever seen any yourself or heard of any?

A. I don't know.

Q. I am asking you for your best recollection?

A. I told you I don't know.

Q. I ask you is it not more or less common knowledge in Vance County that for the past thirty or forty years no negro has ever served on a jury in Vance County?

A. I never helped draw a jury.

Q. Isn't it common knowledge?

A. I don't know.

Q. You have lived there forty years?

A. Yes.

[fol. 115] Q. Have you ever seen a negro on the jury in Vance County?

A. No I never had.

Cross-examination of W. H. Blacknall.

By Mr. Rhodes:

Q. The list was brought to you by the clerk to the board?

A. Yes, sir.

Q. He brought the list made up from the tax list?

A. Yes.

Q. And the list circulated around to the board?

Objection by Petitioners.

Mr. Gates: I don't think it fair and competent for counsel to lead him, ask him questions and he say "Yes" and "No".

The Court: I see no objection to the cross examination so far. Just be careful about it.

Q. You stated you did mark off two or three names. You knew whether they were white or black?

A. No, I don't remember.

Q. As to the names stricken off by various members of the board, did you hear any discussion as to whether or not any of them were negroes or whites?

A. No, sir, I didn't.

Q. In going over this list did you observe any dots before or after any names of persons whose names appeared thereon?

A. No, sir.

Q. In looking at that list did you have any way to tell from the list other than your personal knowledge of the men as to whether or not the person named on the list was [fol. 116] negro or white?

A. No, sir.

Q. And that list was turned back to the register of deeds who was clerk to your board?

A. That's right.

Q. What instructions if any did you give him as to what to do with the list?

A. Didn't give him any instructions. It was customary that he should put them in the jury box.

Q. Did you ever suggest to Mr. Robinson that he in any way eliminate from the list submitted to the commissioners the names of any negroes?

A. No, sir.

Q. Ever discuss with him the question of placing dots before or after any particular name on the list?

A. No.

Q. When you passed upon that list what was the basis of your approval of the list?



A. If any commissioner knew of any cause why he didn't think a person was eligible to serve on the jury we marked it out.

Q. Did that apply to negro and whites alike?

A. Yes, sir.

Q. The action that was taken in approving this list, was that taken just by individual members of the board or by the board as a body?

[fol. 117] A. By the board as a body.

Q. Mr. Blacknall, have you ever heard the question discussed before the board of county commissioners or by the board of county commissioners as to whether or not any negro's name should be eliminated from the jury box?

A. No, I never have.

Q. Did you place all names in there irrespective of whether or not they were black or white?

A. Yes. If no cause for marking it out we left it on the list.

Q. Would you say that a person who was a negro that his name was eliminated from the box solely because he was a negro?

A. No, sir.

Q. Were you in the court room in Bertie County?

A. Yes, sir.

Q. State whether you had any knowledge of whether dots were before or after the names of any person?

A. Never heard of those dots until it was brought up in Bertie County.

Q. You now know why they were put on there?

A. No, sir.

Q. If there were any dots after the names on the list would that indicate to you whether they were black or white?

A. No, sir.

Q. You know anything about the race of persons who have served on the jury since July, 1949?

[fol. 118] A. You mean has any negro been drawn?

Q. Yes.

A. I don't remember.

Q. You don't know of your own knowledge whether negroes served on the jury or were drawn from the jury box.

to serve on the jury in Vance County either before 1949 or after 1949?

A. No, I don't.

Re-direct examination of W. H. Blacknall.

By Mr. Taylor:

Q. You say the dots on the slips in the jury box you had never seen until in Bertie County?

A. No, I had not.

Q. So they got on there after you commissioners had looked at the list?

A. I don't know.

Q. So far as your knowledge is concerned they got on there after you saw the list?

The Court: He said he didn't observe them on there. I know I wouldn't observe them on there. Your statement is you don't know how or when they got on there?

A. That's right.

Q. The commissioners gave the register of deeds no instructions but just followed the usual custom and let him make the preparation?

A. Yes.

[fol. 119] Q. Can you account for the fact that out of eight thousand people only two thousand were in the jury box?

A. No.

Q. You made no inquiry of the register of deeds why that was so?

A. No.

Q. You know any other county commissioner who did it?

A. No.

Q. You have knowledge of the approximate population of Vance County?

A. No.

Q. Or in 1949?

The Court: It is agreed it is about thirty thousand.

The Witness: It is increasing.

Q. How about the 1950 census?

A. I don't know.

No further questions.

Re-cross examination of W. H. Blacknall.

By Mr. Rhodes:

Q. To your knowledge has the name of any person been eliminated from the list of names drawn from the jury box because of any dot appearing before or after the name?

A. No, sir.

Court adjourned at one o'clock P.M. for lunch and re-convened at two-fifteen o'clock P.M.

[fol. 120] Sheriff E. A. COTTRELL, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Taylor:

Q. You live in Vance County?

A. Yes.

Q. What is your official capacity with Vance County?

A. Sheriff of the county.

Q. How long have you held that position?

A. Eight years.

Q. Prior to that did you hold any position?

A. Deputy Sheriff.

Q. Have you held any other position except sheriff and deputy sheriff?

A. No.

Q. How long deputy sheriff?

A. Twelve years.

Q. So you have been in the sheriff's department of Vance County twenty years?

A. Yes.

Q. As Sheriff of the county the matter of summoning persons to serve on the juries in Vance County has come under your jurisdiction?

A. Yes.

Q. You have been engaged in that for the last twenty years?

A. Yes.

[fol. 121] Q. Prior to the calling of the special venire in 1949 had you ever summoned a negro for jury duty in Vance County?

A. I think we have sent them cards but whether they got them I don't know. They give us a list when the county commissioners draws the jury. A child under ten years old draws the names out of the box. They write them down on a pad, give us a list and I send every one a card or deputy will send them.

The Court: How long has that been the practice?

A. Ever since before I came there.

Q. Twenty years?

A. Yes, sir.

Q. During your twenty years in the office have you of your own knowledge known of a negro called for jury duty or served on a jury in Vance County?

A. I don't know for certain but I think one or two served on there in 1948.

Q. You know their names?

A. No, I don't.

Q. Do you recall testifying in Bertie County?

A. Yes.

Q. Did you recall during that time?

A. I had heard of none but since I have been back from the information I could get one or two summoned as jurors but whether they served I don't know.

[fol. 122] Q. I am talking about back of July, 1949.

A. I don't remember.

Q. You do recall testifying before that of your own knowledge during your time as sheriff you had not known of any negro serving?

A. Not of my own knowledge.

Q. Do you think if there had been you would have known it?

A. It could have slipped my memory.

Q. You are in court every term?



A. Yes.

Q. And if there had been any negroes prior to 1949 you would have known it?

A. I think it was a Bullock that served before that time but I wouldn't be certain of that.

Q. I would like to ask you, Mr. Sheriff, is it not more or less of common knowledge that prior to the calling of this jury in 1949 no negroes served on the jury in Vance County?

A. They hadn't served on it. We had some serving on the last jury. We had three on the petit jury and one on the grand jury.

Q. That was since this special venire was drawn?

A. Yes.

That is all.

[fol. 123] Cross examination of Sheriff Cottrell.

By Mr. Brogden:

Q. You couldn't testify that you actually never saw any negroes on the jury prior to 1949?

A. I don't remember but it seems to me one or two but I am not certain.

Q. You mentioned that you had been at every term of court?

A. I haven't skipped a term of court there in twenty years.

Q. Have you seen any negroes on the jury recently?

A. Yes.

Q. What terms of court?

A. October and January.

Q. How many on the jury in October?

A. Five I think. Four I know. Three in October and four or five, I know four at the January term of court.

Q. You have any members of the negro race on the grand jury?

A. Yes, one or two and they asked the foreman to excuse them.

Q. Any of them serve?

A. Not on the grand jury. Two of them served on the October jury. Stayed there all the time.

Q. You say you send out post cards for the regular jury?

A. I send them a card. It is a double card. They sign that card that they will accept service, tear that off and return it.

Q. If the card is not returned what do you do?

A. Mark on it not served.

Q. Do you on occasions try to find them?

[fol. 124] A. If no one answers to the name the Judge has to have an excuse why they won't serve. Either sick or out of the county.

Q. You attempt to serve every one on the list?

A. Yes, sir. Sometimes the card comes back and the mail man says not to be found. Therefore we report back to the court.

Q. You haven't given instructions to your deputies not to serve people because they are of the negro race?

A. No, sir.

Q. You haven't failed to serve any one of the negro race?

A. No.

Q. You serve every one on the list brought to you?

A. Yes, sir.

Q. And your deputies are instructed to do that?

A. Yes.

Q. How are you paid?

A. Paid by the names. We get fifty cents apiece for every juror summoned. County auditor pays it to us.

Q. You are on a salary?

A. Yes. We don't get the fee. Take it out of one pot and put it back in another pot.

Q. Was Thaddeus Jackson on the grand jury?

A. He was on there in October.

Q. He did serve on the grand jury?

A. Yes, him and another one.

Q. How is your grand jury selected?

[fol. 125] A. Twice a year. Each one serves six months.

The Court: You draw nine at the time?

A. No, sir, the whole eighteen is drawn at once.

Q. You don't have the stagger system?

A. No, sir.

Q. Were you at the October term of Court, 1949 when

they had quite a few special venires for the Carolina Light and Power Company?

A. Yes.

Q. Were any negroes drawn on jury duty at that term of court?

A. Yes.

Q. About what would your estimate be of the number drawn?

A. Four or five. I never paid any attention to them. After I send them out I throw the cards away. The Clerk keeps a list of the jury and we don't bother with it.

Q. How about the term the first part of 1950, January, 1950?

A. I can't remember back.

Q. Do you remember whether a man by the name of Bullock was on the grand jury, E. A. Bullock?

A. Yes, E. A. Bullock, high school teacher in Henderson.

The Court: Was he on the grand jury?

A. Yes, sir.

Q. How about the June term, 1950?

A. I can't recall right off-hand. We have had so many since then.

[fol. 126] Q. Isn't it common knowledge or from your own personal knowledge isn't it true that negroes have consistently served on grand and petit juries from July, 1949 until the present date?

A. Yes, sir. This last grand jury two on there that asked the foreman to excuse them because they had work to do.

Q. I was in your office one day and several people wanted to know if they could be excused.

A. Uncle Jim Henderson came in.

Q. What does your department tell them?

A. Told them no way I could excuse them. They would have to go before the Judge, that that was his business and he would have to excuse them.

Q. You never excused anybody?

A. Unless I knew unable to get there and I put the reason not served. I know this last court I was sitting in my office and Robert Hawkins came in and brought the card and

asked me to excuse him and I knew he was in a critical condition, and has since died, and I told her to forget him.

Q. If you serve a man it is made an official record of the court?

A. Yes, sir.

Q. Do the county commissioners in any way consult you about any one?

A. Myself or one of the other officers always present when they draw the jury out of the box. We have a little girl or child under ten years old.

[fol. 127] Q. Were you present when the Bertie venire was drawn?

A. I wasn't there but my deputy, Mr. Faulkner, was there.

Q. Was Mr. Faulkner there all the time?

A. Yes, sir. His little girl drew the jury.

Q. You get personal service when you have a special venire?

A. Either call them over the telephone or go to see them direct.

Q. You followed the same procedure in that as with the post cards, you try to summon everybody on the list?

A. Yes, and if we send the cards out I go a day or two before court and check the cards back and those who haven't sent cards back if we can contact them by telephone we call them and if we can't get them we make an effort to see him.

Q. You make an effort to see that every juror is served?

A. Yes, sir, have to do it or the Judge will want to know why.

Q. I direct your attention to the present term of court you are having now. Is J. A. Henderson one of the jurors serving at the January Term, 1951?

A. He didn't serve. He came up and got excused.

Q. He was summoned?

A. Yes, and brought his card in.

Q. How about Philip E. Reed?

A. He served the past term.

Q. Were both of those two negroes?

A. Yes, sir. I know them very well.

Q. How about R. E. Wimberly?



[fol. 128] A. I will be fair with you I don't know R. E. Wimberly.

Q. How about Frank Edwards?

A. I know him.

Q. Did he serve?

A. Yes, sir.

Q. And he is a negro?

A. Yes, sir.

Q. How about William Cousins, Sr.?

A. He was summoned from No. 6.

Q. Did he serve?

A. This last court?

Q. Yes.

A. I think he did. I think he stayed in the courthouse the whole week.

Q. What about Walter Christmas?

A. He served.

Q. He is a negro?

A. Yes, sir.

Q. How about Cyrus Boyd?

A. He served. He lives in town.

Q. He is a negro?

A. Yes, sir.

Q. The last term of court there were a considerable number?

A. Four or five that served.

[fol. 129] Q. Two could have been jurors but they asked to be excused?

A. Yes, sir. My information from the foreman was he wanted to be excused.

Q. From your personal knowledge would you say this situation is typical of most grand and petit juries from 1949 to date?

A. Yes, sir.

Q. Do you have any personal knowledge about the dots on the jury list? Did you put any on there or observe anybody putting them on there?

A. No, sir, never heard of the dots until down in Bertie County.

Redirect examination.

By Mr. Taylor:

Q. You don't have anything to do with the jury box?

A. No.

Q. Don't know whether it is constitutional or not?

A. No.

Q. All you say is you undertook to serve those people?

A. The list I get is the one I try my best to serve.

Q. You didn't add any names or strike any off?

A. Not unless I know they are dead. I have had names I knew the party was dead and marked opposite it "Dead".

Q. Can you estimate how many persons have been summoned for jury duty since July, 1949?

A. No.

Q. Would you say as many as four hundred?

[fol. 130] A. Something like that.

Q. To the best of your recollection how many of that four hundred have been negroes?

A. I don't know. I don't know whether it would be four hundred.

Q. You say you recall some negroes having been called. How many altogether since July, 1949?

A. I don't know.

Q. You say four in January this year?

A. We have had five or six courts.

Q. Four in January this year?

A. Five in January this year.

Q. How many in October?

A. Three or four. I can't recall.

Q. Have as many as ten altogether been called since the fall term, 1949?

A. I imagine so. Might be more or might be less.

No further questions.

STIPULATIONS

Mr. Taylor: We wish to show the number of taxpayers. In arriving at the figures we excluded non-residents, estates, partnerships, duplications and also back listing. It is stipulated that the following is a list of individual taxpayers in the county:

Whites, 5097 on the tax books for 1948;  
3136 negroes on the tax books for 1948.  
Which is 38 percent negro.

[fol. 131] The Court: How many did you eliminate?

Mr. Brodgen: About 1150.

Mr. Taylor: I will read the census figures on population in Vance County:

1940 Census. Table 21 of the Census, page 45 shows total population in Vance County 29961. Of that 15996 whites, 13958 negro. Percent negro 45.6 percent.

And from Table 22, page 64, entitled "Age, Race and Sex by Counties", for Vance County persons 21 years and over 15811. Of that number negro male 21 years and over 3322, negro female 3383. Percent negro male and female as of total, 42.4 percent.

Also from Table 22, page 64, persons in certain age category: 50 to 54 years, total 1144. Of that white male 312, white female 366; negro male 232, negro female 227. In the age category: 55 to 59 years, total 882. Male white 227, female 292; male negro 174, female negro 131. In the age category, 60 to 64 years, total 726; male white 233, female white 236; male negro 123, female negro 128. 65 to 69 years, total 570; male white 157, female white 174; male negro 111, female negro 124. In the category 70 to 74 years of age, total 360. Of that male white 89, female white 107; male negro 95, female negro 66. Age limits of groups 75 years and over, total 355; male white 79, female white 122; male negro 76, female negro 76.

[fol. 132] On page 77, Table 23, entitled "Persons 14 years old and overall employment status. Class of workers, Major Occupation Group, Industrial Group and Sex by Counties": Total persons from 14 years of age and over, 20747; non-white persons 14 years and over 9154, percent of non-white 14 years and over 44.

Total in labor forces 10893; total non-white 4957; percent non-white 45.5;

Total persons in school not in labor force 2314; total non-white 1042; percent of non-white 45.

From page 21, Table 11, school, age and race for state 1940, ages 5 to 24 years, total native white attending school

587,986, total number of negroes attending school 241,390. Total number of native white ages 5 to 24 years 1,077,892, native number of negroes 456,204.

From Table 13 on page 27, entitled "Persons 25 years old and older, all years of school completed, race and sex for the state," Persons having completed 7 and 8 years of graded school, all classes, 344,891; negroes having finished 7 and 8 years of graded school 61,436; persons having finished one to three years of high school, total 226,448, negroes having completed one to three years of high school 27,251; persons having finished four years of high school, total 152,816; negroes having finished four years of high school 10,501; persons having finished one to three years [fol. 133] of college, total 88,864; negroes having finished one to three years of college 6,602; persons having finished four years or more of college, total 67,036; negroes having finished four years or more of college 6,366.

It is stipulated that in the jury box are 2126 names and that there are 145 negroes in that group.

The Petitioner rests with the exception of one witness who is not here.

The Court: If he doesn't appear I will accept the affidavit and that of any other witness you may desire to offer, and I will accept the affidavit of any witness for the respondent.

The respondent renews objection to all the evidence and moves that it be stricken. Objection overruled. Motion denied.

The Court: It is generally understood that all testimony is over objection. The objection is overruled.

Respondent renews the motion to dismiss. The motion is denied. Respondent excepts.



L. B. FAULKNER, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Broughton:

Q. State your name?

A. L. B. Faulkner, deputy sheriff of Vance County.

Q. How long have you been deputy sheriff of Vance County?

[fol. 134] A. Eight years.

Q. You have been assisting the sheriff in summoning jurors?

A. Yes, sir.

Q. In what manner did you go about summoning jurors?

A. Regular jury we send a jury card.

Q. Do you happen to have one of those with you?

A. This is it. A double card. We fill it out and send it to each person. When they receive it they tear it half in two, sign it and send the half back addressed to the Sheriff.

Q. About what percentage of the cards do you get back?

A. Over ninety-nine percent.

Q. If someone doesn't send a card back what do you do?

A. Two or three days before court starts we check the list and see who has returned the card and who has not and then try to contact the ones who haven't.

Q. Either by telephone or personal service?

A. Yes, sir.

Q. Have you received any instructions that negroes shall not be served?

A. No, sir. We send cards to every name handed to us.

Q. Have you yourself discriminated against negroes for serving?

A. No, sir.

Q. To your personal knowledge has any discrimination been practiced?

A. No discrimination.

[fol. 135] Q. Do you have any personal knowledge of any dots being on the jury scroll?

A. I didn't until Bertie County.

Q. You don't know how they got on there?

A. No, sir.

Q. The Clerk gave you a list of the ones to be served for jury duty. You know whether there were any dots then?

A. No, sir.

Q. You know that any are negroes?

A. Only way I find out I go to the tax book. In the tax book each name has a number opposite it which denotes the township and then I look in the tax book and find the address.

Q. You send them out regardless of white or negro?

A. Don't make any difference.

Q. Do you turn in the list of those who were not summoned?

A. Yes, sir.

Q. To whom does that go?

A. Most of the time we have two lists. The Sheriff keeps one and the other goes into the auditor's office.

Q. When a person is not summoned what sort of record is made on the clerk of the superior court record?

A. Not served.

Q. How is that indicated?

A. When court convenes the court calls for the list. The sheriff is there with his list and if the sheriff has not called them we say in open court "Not served".

[fol. 136]. Q. Do you make a notation on your list?

A. "Not served".

Q. You put that opposite each name?

A. If he is served I mark a cross mark or an "X", and the ones that haven't been served I put on "Not served".

Q. Have you been present at most terms of court?

A. All except one in the eight years I have been there.

Q. Have you noticed any negroes on the petit jury since 1949?

A. They have been drawn from every jury since then.

Q. Notice any members of the negro race were on the grand juries?

A. Two or three. E. A. Bullock and Thad Jackson served on one and it seems to me William Crews served on one.

Q. Approximately how many negroes on each petit jury?

A. From one to five.

Q. What has been the average number for each term of court?

A. I would say three or four.

Q. How many are on your present or January term of court, petit jury, how many negroes on that?

A. I think five or six names drawn. One was Hawkins who was sick and one more came back "dead".

Q. I direct your attention to the special venire drawn for the trial in Bertie County. Would you tell us exactly what happened at the time that special venire was drawn and who was present? Were you there?

[fol. 137] A. Yes, sir.

Q. Would you tell exactly what happened?

A. My little girl drew the names out of the box.

Q. How old is your little girl?

A. At that time five years old, now six years.

Q. How did your little girl happen to be called?

A. We got a call from Bertie County that they were coming up to draw a special venire. We knew we needed a little girl so I went and got my little girl and brought her in.

Q. Was she the one most easily available?

A. Yes, sir.

Q. Who was present when the names were drawn?

A. Two ladies in the register of deeds' office, the defendant Speller, deputy sheriff with him, Lawyer Taylor, Solicitor Tyler, myself and little girl, and I believe the clerk of the court.

Q. Was the box arranged so every one could see the names being drawn?

A. Sitting on the end of the desk kinder like this. Speller and the deputy sheriff on this side and I was here and the little girl there, and Taylor was over here.

Q. Could Mr. Taylor have seen the names as they were drawn out?

A. I don't know whether he could have seen them. Whether he read them or not I don't know.

Q. Did you call them out?

A. I called them out.

[fol. 138] Q. How did the little girl draw the names?

A. One at the time.

Q. Where did she draw them from?

A. No. 1 box.

Q. Did you notice any of the scrolls were rejected or any objected to?

A. No, sir. I remember one name was called out, Mr. Z. A. Zollicoffer, and another fellow Walker. Mr. Zollicoffer said something about this man being dead. We wanted to know.

Q. What happened to his name?

A. They kept it on the list.

Q. Did you notice anything on the scrolls that would tell you whether a person were negro or white?

A. I didn't pay any attention. The only thing when they handed it to me I read it and dropped it in the other end of the box.

Q. Unless you knew them personally you wouldn't know whether they were white or negro?

A. No, sir.

Q. Who made the list?

A. Miss Brogden.

Q. She is deputy register of deeds?

A. Yes, sir.

Q. How many did you draw?

A. One hundred.

[fol. 139] Q. The prisoner and his counsel were there during all the procedure and in position that they could see what was happening and hear what was said?

A. Yes, sir.

Q. Out of those hundred names drawn how many approximately reported to Bertie County for service?

A. I don't know.

Q. Would sixty-eight to seventy be a good figure?

The Court: It is in the record.

Cross-examination of L. B. Faulkner.

By Mr. Gates:

Q. You say you have been deputy sheriff eight years?

A. That's right.

Q. Prospective jurors, you testified that you saw none on the panel. That was prior to July, 1949. I mean after that:



A. I don't understand.

Q. Those colored jurors that you summoned, that was after July, 1949?

A. Yes.

Q. During the eight years you served as deputy sheriff you haven't seen any colored jurors serving prior to 1949?

A. Not that I remember.

Q. Then you can't recall specifically any that you summoned?

A. No.

[fol. 140] The Court: You are talking about before July, 1949?

Mr. Gates: Yes, sir.

Q. Isn't it common knowledge in Vance County that colored people don't serve on the jury?

A. They didn't up to this time.

Q. After July, 1949 that is when—

A. Since that time they have been drawn for superior court jury and also six man jury for recorder's court.

That is all.

Re-direct examination:

Q. This was the first jury drawn out of this particular box, the one in Bertie County?

A. Yes, sir.

Q. All those jurors that you testified served subsequent to July, 1949, they were drawn out of the same box as the Bertie County jury?

A. Yes, sir, out of the same box.

Re-cross examination:

Q. You don't know how the jury box was constituted, where the names are drawn?

A. No.

Q. And how the names got in there and how it is made up?

A. Only thing, if I am on duty most of the time I am there but so far as preparing the jury box I don't know anything about it.

That is all.

[fol. 141] CHAS. W. WILLIAMSON, having been first duly sworn, testified as follows:

Direct-examination.

By Mr. Taylor:

Q. State your name and address?

A. Charles W. Williamson, Henderson, North Carolina.

Q. Mr. Williamson, what is your business?

A. I am a lawyer.

Q. Practicing law in Henderson in Vance County?

A. Yes, sir.

Q. How long have you been practicing law?

A. Since October, 1933.

Q. During that time have you had occasion to visit the various terms of court of Vance Superior Court?

A. Every term. I have some business in most all of them.

Q. Prior to July, 1949 you ever known a negro to be called for jury service in Vance County?

A. I have not.

Q. Is it not more or less common knowledge that prior to July, 1949 negroes had not and did not serve on juries?

A. It is.

Cross-examination of Chas. W. Williamson.

By Mr. Brogden:

Q. You say you have attended all courts in Vance County since July, 1949?

A. Yes, sir.

[fol. 142] Q. You have noticed whether negroes are on those juries?

A. The only one I know of that actually served on the jury was in superior court January, 1950.

Q. Who was that?

A. E. A. Bullock.

Q. He was on the grand jury?

A. Yes, sir.

Q. I direct your attention to the term January, 1951. How many persons of the negro race were serving on the grand and petit jury?

A. I suppose three or four. I knew one by name. I know one was on the grand jury and I do recall one or two being called and examined for petit jury but as to the number I couldn't say.

Q. But a greater number actually served. Some requested to be excused and some the Judge refused?

A. Some were refused.

Q. A great number were summoned to serve?

A. I know they were there but what took place I don't know. At all times I wasn't in the room. Whether they asked to be excused or not I couldn't say.

Q. Did you sit in on the Carolina Power and Light Company case in 1949?

A. Some of it.

Q. How many negroes were drawn for jury duty in that case?

[fol. 143] A. I recall two from Northampton County.

Q. I am asking you about the special venire October 12, 1949?

A. The selection of the jury took quite a while. There were some negroes drawn. What I was trying to say, when they tried the Carolina Power and Light Company case they had a jury from Northampton County.

Q. They exhausted several special venires from Vance County?

A. Yes, sir.

Q. I direct your attention to August 29, special venire Bertie County. Were you present when that was drawn in this particular case?

A. No, sir, I was not. I have just been asked to come down as a witness.

Q. Isn't it true that negroes have consistently served in jury panel at every term of court in Vance County since July, 1949?

A. We didn't have a term there in July. Our term is in June and October of last year. I can't recall October, 1949.

Q. You know William Crews?

A. No.

Q. Maggie Cunningham?

A. No, sir.

Q. You know Sallie Eaton?

A. There are two Sallie Eatons. You mean Sallie Tom? I recall Sallie.

[fol. 144] The Court: What do you recall about the terms in 1950 and 1951?

A. I recall occasions when I am trying cases. E. A. Bullock is a friend of mine. He was a juror in January, 1950. At the last term of court I had two or three cases there.

Q. Last week?

A. Yes, sir.

Q. Negroes were on the jury?

A. Yes, sir.

Q. How many?

A. I don't recall a negro serving on the petit jury. I don't recall because my cases didn't go to the jury.

Q. You are making a distinction between the ones on the panel and the ones actually called in and sat on the trial of a case?

A. No, sir, the courtroom was full and I couldn't tell who was summoned unless he was placed in the box or rejected.

Q. You can't testify of your own knowledge that there has not been an average of three or four or five summoned for jury duty since July, 1949?

A. Let me make myself clear. I didn't know they were coming up. I have known them to be called but the exact number I couldn't say and the only way I could tell whether one is called is the fact his name is called and he is excused or not.

Q. Have you observed that they have been called at each term of court subsequent to July, 1949?

A. I am not sure on that.

[fol. 145] Q. You couldn't say that they have not served at each term of court after July, 1949?

A. No, sir, I couldn't say because frankly I—

The Court: I believe the witness has done the best he could.

#### OFFERS IN EVIDENCE AND STIPULATIONS

Respondent offers in evidence the break-down of the totals of names drawn from the jury boxes as follows:

From Box No. 2 a total of 779, of which 41 were negroes;



From Box No. 1 a total of 1347, of which 104 were negroes.

It is stipulated that it will not be necessary for the court reporter to include the entire list of names but that the names of negroes drawn from Box No. 2, 41 in number, be incorporated in the record, and that that list be made alphabetically. (Note; See page 24)

Respondent offers in evidence the record filed in the Supreme Court of North Carolina at the Spring Term, 1950, and same is marked "R-1". Respondent is permitted to withdraw the exhibit.

It is stipulated that whites and colored eliminated from the total of 8233. In addition there were some other types of names in the books; assets, partnerships, corporations, back listings, the grand total before all these eliminated, 5825 white and 3555 negroes, making a grand total of 9380 before certain categories were excluded. Approximately [fol. 146] that many names were listed in the tax book. Of the exclusions 237 whites were excluded because the listing was for an estate, of the negroes 220 were excluded because they were estate listings, making a total of 457 tax listings or names excluded because they stood for the estate of deceased persons.

The next category of exclusion is non-residents. Total of 271 white listings excluded for this reason, a total of 136 negro tax listings for this reason, making a total of 407 excluded because they were non-residents and not residents of Vance County.

The next category for exclusion, tax listing partnerships, which includes also corporations and in some instances individual proprietorships, of the white listings 67 were excluded, of the colored 11, making a total of 78.

The next category excluded was back listings, for white a total of 52, negro a total of 45, making a total of 97.

The last and final category is duplications. Where a person owned several pieces of land and they were listed separately white 101, negro 8, making a total of 109.

Counsel for petitioner stipulates to the correctness of these figures.

Mr. Rhodes: I understand there were two negroes who appeared in the trial jury box, one of those excused by the

Judge by consent of both sides because she was a moron, that the other negro was excused by the defendant. It seems somewhat of an attack on the administration of justice [fol. 147] of the State of North Carolina. I think this has some bearing on the part of the court officials that that feeling was not there and that the only negro competent to serve and who was in the jury box was passed by the Solicitor but turned down by the defendant.

Mr. Taylor: That is the first time I have heard of it. We have never had opportunity to question a potential negro juror.

Mr. Rhodes: Do I understand there were two negroes in the trial jury box?

Mr. Taylor: Not one has survived the State's examination in three years.

Mr. Rhodes: Were there not two negroes that appeared in the trial jury box?

Mr. Taylor: Four appeared and were questioned by the Solicitor.

Mr. Rhodes: Every person who came there didn't have opportunity to appear in the trial jury box.

Close of the hearing.

[fol. 148] Reporter's certificate (omitted in printing).

[fol. 149] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT  
OF NORTH CAROLINA

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed July 12,  
1951

Upon the evidence presented and the stipulations of counsel, the Court finds these facts:

1. Petitioner, an inmate of the Central Prison of the State of North Carolina, instituted this proceeding against respondent, Warden of the aforesaid prison under Chapter 153 of Title 28 of the U. S. Code, by affidavit and motion to proceed *in forma pauperis* for a writ of habeas corpus.

2. Petitioner contends that he is unlawfully detained in prison and under sentence of death at the aforesaid prison.

3. Petitioner was convicted of the capital crime of rape at the August, 1949 Term of the Superior Court of Bertie County, North Carolina, on September 5, 1949.

4. The first indictment upon which petitioner was tried was found at the August, 1947 Term of Bertie County Superior Court by a grand jury; he was tried and convicted under this indictment at the November, 1947 Term; upon appeal to the Supreme Court of North Carolina (*State v. Speller*, 229 N. C., p. 67), it was held that the indictment was invalid because of arbitrary exclusion of negroes from the grand jury on account of race; a second indictment was returned at the August, 1948 Term of Bertie County Superior Court by a grand jury composed of members of both the white and negro races; the validity of this second [fol. 150] indictment has not been challenged; at the November, 1948 Term of the same Court petitioner was convicted by a jury drawn from Warren County, in accordance with North Carolina law, and sentenced to death; upon appeal from this judgment, the Supreme Court of North Carolina vacated the judgment and granted a new trial for the reason that the trial Judge refused to give counsel for the defense time to investigate the facts and to procure evidence from Warren County in support of the challenge to the array (*State v. Speller*, 230 N. C., p. 345); the third trial, the one now questioned, was held at the August, 1949 Term of the same Court, and again the petitioner was convicted and sentenced to death; when the case was called for trial, the presiding Judge, upon petitioner's motion, ordered that "a special venire from Vance County be summoned by the Sheriff of Vance County to attend at the Court House in Windsor, N. C. (Bertie County) . . . to serve as jurors in said action"; and ordered "the Clerk of the Board of Vance County Commissioners to cause one hundred scrolls to be drawn from box No. 1 by a child under ten years of age" to constitute the special venire; in pursuance to such order the scrolls were drawn by a child under ten years of age in the office of the Clerk of the Superior Court of Vance County, in the presence of petitioner, his counsel, Mr. Herman L.

Taylor, the Solicitor of the District, and the Clerk of the Board of Commissioners; of the one hundred drawn, sixty-three were served and appeared; of the one hundred drawn, seven were members of the negro race, and of the sixty-three, four were negroes; the others were members of the white race; from those attending, the jury which convicted the petitioner was drawn according to the North Carolina Statutes and the practice in its Courts; one of the negroes was examined on his voir dire, but the jury as finally constituted was composed exclusively of members of the white race.

[fol. 151] 5. After entry of plea of not guilty to the indictment, the petitioner challenged the entire array of special veniremen drawn from Vance County on the ground that the officials of Vance County whose duty it was to prepare the jury list purposely, arbitrarily and systematically, discriminated against members of the negro race by excluding negroes from the jury box solely on account of race.

6. Upon presentation of such challenge the trial Judge heard such evidence as petitioner desired to offer, and thereupon overruled the motion and disallowed the challenge. (The findings of fact on this evidence are set forth at page 57 of the transcript on appeal to the Supreme Court of North Carolina). The jury returned a verdict of guilty without recommendation of mercy, and again petitioner was sentenced to death.

7. From this judgment the petitioner again appealed to the Supreme Court of North Carolina, and on this appeal the judgment was affirmed, the Court, through the Chief Justice, stating: "On the present hearing, all charges of discrimination, jury defect and alleged irregularities, which again constitute the defendant's principal exceptions, have been carefully investigated with ample opportunity afforded the defendant to be heard upon his challenges. No such exclusion appears here. The challenge of the array was properly overruled on the findings made by the trial Court, which are amply supported by the evidence and are without sufficient challenge under the rules . . ."

8. Upon the affirmation of the Supreme Court of North Carolina of petitioner's third conviction and sentence,



application was filed with the Supreme Court of the United States for a writ of certiorari to review the decision of the North Carolina Court, and on the 9th day of October, 1950, the Supreme Court of the United States denied the application.

9. Upon denial of the petition for writ of certiorari by [fol. 152] the Supreme Court of the United States, the petitioner filed this petition for writ of habeas corpus, and a writ was issued and an order entered staying the execution of the judgment of the State Court pending a hearing.

10. The respondent, in compliance with the writ, brought the petitioner before the Court in Tarboro, N. C. in the Eastern District of North Carolina, on January 3, 1951, to which date the return by order of the Court had been continued.

11. At the outset of the hearing upon the return, the respondent filed a motion to discharge the writ without the taking of evidence (this motion is filed with the court papers). The Court reserved its decision upon the motion and proceeded to the taking of evidence from both the petitioner and respondent. The respondent entered a general objection to every question propounded by petitioner, his witnesses, and upon the overruling of each objection the respondent moved to strike out the answer and in each instance the motion was denied. In every case where the respondent examined the witness in his behalf, the questions were propounded after respondent had reiterated his objections to all the evidence and reserved his exceptions.

12. At the conclusion of all the evidence the respondent renewed his motion to dismiss, and this motion was denied and overruled.

13. The petitioner is a member of the negro race.

14. The facts found by the trial Judge in the State Court, in respect to the composition of the trial jury, are supported by the evidence, including that taken in the State Court, and these findings are adopted as the findings of fact bearing on this question; and the Court specifically finds it was not shown that there was purposeful, systematic and arbitrary exclusion of negroes solely on account of race from the jury boxes of Vance County, from which the

[fol. 153] special venire was drawn, and from which the trial jury was selected.

### Conclusions of Law

Upon these facts the Court concludes:

1. The Court was in error in overruling the respondent's motion to dismiss as a matter of law before the introduction of evidence, and that such motion be and the same is now granted.

2. That the petitioner, who was being held as a prisoner by respondent, awaiting execution under the judgment of the North Carolina Court, was not and is not "in custody in violation of the Constitution or laws or treaties of the United States" within the contemplation of Sec. 2241 (c) (3) of Title 28, United States Code Annotated, and is not entitled to his release as prayed.

3. That the writ should be vacated, the petition dismissed; and the petitioner remanded to the respondent and the North Carolina authorities for further proceedings under the judgment of the State Court and in accordance with its provisions.

4. That an order to such effect be entered.

July 12, 1951.

Don Gilliam, United States District Judge.

[fol. 154] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT  
OF NORTH CAROLINA

### MEMORANDUM OPINION—Filed July 12, 1951

The petitioner, a negro, has been tried three times before a jury in the Superior Court of Bertie County, North Carolina, and convicted on each trial. The bill of indictment upon which he was tried was returned at the August, 1948 Term of the Superior Court of Bertie County by a Grand Jury consisting of members of both the white and negro races, and charged the petitioner with the crime of rape. The petitioner duly appealed to the Supreme Court of North Carolina, from each of the judgments which sentenced him

to death; the first appeal is reported as *State v. Raleigh Speller*, 229 N. C., p. 67; 47 S. E. 2nd, p. 537; and in this case the Supreme Court of North Carolina held that the motion of the defendant to quash the indictment should have been allowed upon the showing that in Bertie County the names of negroes were printed in red and the names of white persons were printed in black, and that in drawing the names from the box the names of negroes were without exception rejected, as such procedure constituted "systematic and arbitrary exclusion of negroes from the Grand Jury" on account of race. The Supreme Court ordered that the petitioner be held for the finding of an indictment by a proper Grand Jury.

The second appeal is reported as *State v. Raleigh Speller*, 230 N. C., p. 345; 53 S. E. 2nd, p. 294. On this appeal the Supreme Court granted the petitioner a new trial, stating in its opinion: "Thus, the record disclosed not only that the [fol. 155] prisoner and his attorneys were denied a reasonable opportunity in the light of prevailing conditions to investigate, prepare and present his defense on the challenge to the array, but also that such denial of such opportunity prejudiced the prisoner's rights."

The third appeal is reported as *State v. Raleigh Speller*, 231 N. C., p. 549. On this appeal the judgment of death imposed in the Superior Court was affirmed and Chief Justice Stacy, writing for the Court, stated: "For the third time the defendant appeals from a conviction of rape, without any recommendation from the jury, and sentence of death as the law commands in such cases."

"On the present hearing, all charges of discrimination, jury defect and alleged irregularities, which again constitute the defendant's principal exceptions, have been carefully investigated with ample opportunity afforded the defendant to be heard upon his challenges . . .

"The case was tried at the August Term, 1949, Bertie Superior Court, before a jury selected from a special venire drawn from Vance County at the instance of the defendant. Defendant's counsel suggested that the venire from which the jury should be selected be summoned from the most remote county in the Third Judicial District, the same being Vance County.

"It was made to appear that on the first Monday in July, 1949, the Commissioners of Vance County had purged the jury lists of their County and, in full compliance with the law, had placed the names of persons of both the white and colored races in the jury box, without discrimination of any kind: On the special venire drawn to try the instant case, there appeared the names of seven negroes, the race to which the defendant belongs. It is not the right of any party to be tried by a jury of his own race or to have a representative of any particular race on the jury. It is his right, however, to be tried by a competent jury from which members of his race have not been unlawfully excluded. No such exclusion appears here. The challenge of the array was properly overruled on the findings made by the trial Court, which are amply supported by the evidence and are without sufficient challenge under the rules.

"The exceptions to the charge are feckless and are patently without merit. They are not sustained. The Court was careful to call to the attention of the jury Chapter 299, Session Laws of 1949, providing that 'if the jury shall so recommend at the time of rendering its verdict in open court, the punishment for rape shall be imprisonment for life in the State's Prison, and the Court shall so instruct the jury'. Notwithstanding the instruction, the jury did not see fit to make such a recommendation."

Upon the affirmation by the Supreme Court of North Carolina of petitioner's third conviction and sentence, application was filed with the Supreme Court of the United States for a writ of certiorari to review the decision of the Supreme Court of North Carolina, and on the 9th day of October, 1950, the Supreme Court of the United States denied the application. The application for such writ was based upon the same facts, arguments and contentions as to the law which the petitioner now requests this Court to review upon this petition for a writ of habeas corpus.

When this case was called for trial at the August Term, 1949, of the Superior Court of Bertie County, the presiding Judge, in compliance with the petitioner's motion, ordered "that a special venire from Vance County be summoned by the Sheriff of Vance County to attend at the Court House at Windsor, North Carolina, at 10:30 A.M. on the 31st day of



August, 1949, to serve as jurors in said action", and ordered "the Clerk to the Board of County Commissioners of Vance County to cause one hundred scrolls to be drawn from box [fol. 157] No. 1 by a child under ten years of age, and the names so drawn shall constitute the special venire, and the Clerk of the Superior Court of Vance County shall insert their names in a writ of venire and deliver the same to the Sheriff of Vance County, and the persons named in the writ and no others shall be summoned by the Sheriff of Vance County to be and appear at the Court House in Windsor in Bertie County at 10:30 A.M. on the 31st day of August, 1949. That the said venire shall be drawn as aforesaid in the presence of the defendant, Raleigh Speller, and at least one of his attorneys and the Solicitor of this Judicial District, at 4:30 P.M. on the 29th day of August, 1949."

In pursuance to the above order, one hundred scrolls were drawn from jury box No. 1 by a child under ten years of age, in the office of the Clerk of the Superior Court of Vance County, in the presence of the petitioner, his counsel, Mr. Herman L. Taylor, the Solicitor of the Third Judicial District, Mr. Ernest Tyler, and the Clerk to the Board of County Commissioners of Vance County, who, under the law, has custody of the jury boxes. Of the one hundred individuals whose names were drawn from the jury boxes to constitute the special venire, sixty-three were served by the Sheriff of Vance County and attended upon the trial at Windsor, N. C. Of the number attending, four were members of the negro race, the others were members of the white race. From those attending, the jury which heard the case and convicted the petitioner was chosen according to the statutes and the practice of the court.

The petitioner did not challenge the Grand Jury which found the bill of indictment; and no motion to quash was made; but after argument and entry of a plea of not guilty, the petitioner for the first time challenged the entire array [fol. 158] of petit jurors and special venire summoned from Vance County on the ground that the officials of Vance County, whose duty it was to prepare the jury lists, purposefully, arbitrarily and systematically discriminated against members of the negro race by excluding negroes from the jury lists and panels because of their race, thereby violating

petitioner's right to a trial by his peers as guaranteed under the Constitution and laws of the State of North Carolina and the Constitution of the United States.

Upon the petitioner's challenge to the array of petit jurors and his motion that the Court quash and set aside the entire array of special veniremen, the presiding Judge caused to be issued a subpoena duces tecum to the Chairman of the Vance County Board of Commissioners, the Clerk of the Board, the Clerk of the Superior Court, the County Tax Collector, and the Sheriff, all of Vance County, requiring them to bring in court their several records pertaining to the listing, drawing and summoning of jurors in Vance County, together with the jury boxes and records pertaining thereto. The witnesses subpoenaed appeared before the presiding Judge with their records and the jury boxes, and thereupon the petitioner was given opportunity to present evidence in support of his motion that the array of petit jurors and special veniremen summoned from Vance County be quashed and set aside. The petitioner presented several witnesses, as the record will show, who testified as to the manner and method of the drawing of the special venire as appeared in the transcript of evidence and statement of cases on appeal heretofore filed in this cause, and the presiding Judge made full and complete findings of fact as will appear on pages 57 through 63 of the transcript which has been filed as a part of the record of this proceeding; and upon these findings the presiding Judge overruled and dismissed the motion that the array of special veniremen be quashed and set aside. [fol. 159] The Judge concluded that there had been no purposeful, arbitrary and systematic exclusion of negroes from the jury boxes on account of their race, and thereupon the cause was duly tried by a jury of twelve selected from the panel drawn from the jury box of Vance County, which panel, as above noted, contained four members of the negro race who were served and attended, and three other members of the negro race who were not found and served. This jury found the petitioner guilty and he was sentenced to die.

Although the Court felt strongly disposed to deny the petition for writ of habeas corpus solely on the procedural history, it was decided to give the petitioner an opportunity to present such evidence as he might have upon the merits of

his contentions, therefore, the writ was issued and the respondent in compliance brought the petitioner before the court in Tarboro, North Carolina, in the Eastern District of North Carolina on the 3rd day of January, 1951, to which date the return by order of the Court had been continued. At the outset of the hearing, upon the return, the respondent filed a motion to discharge the writ without the taking of evidence. This motion is filed with the case papers. The Court overruled the motion and proceeded to take evidence from both the petitioner and the respondent. The respondent entered a general objection to every question propounded by petitioner to their witnesses, and upon the overruling of each objection the respondent moved to strike out the answer to the question, and in each instance the motion was denied. When the respondent examined witnesses in his own behalf, the questions were propounded after the respondent had reiterated his objection to all the evidence and reserved his exceptions.

From the evidence introduced the Court has found certain facts separately, and these findings are filed simultaneously herewith.

[fol. 160] At the conclusion of all the evidence the respondent renewed his motion to dismiss, and the motion was denied and overruled.

I had no very serious doubt at the time of the soundness of respondent's motion to dismiss, but such doubt as was entertained was resolved in favor of the petitioner, so that a finding now on the factual background of the case may appear in the record.

The Court now concludes that the writ should be vacated and the petition dismissed upon the procedural history and the record in the State Courts, for the reason that habeas corpus proceeding is not available to the petitioner for the purpose of raising the identical question passed upon in those Courts. There are a number of cases which so hold and the cases cited by petitioner's counsel fail to convince me of the correctness of his contention.

The question is discussed by Chief Judge Parker in *Sanderlin v. Smith*, 138 Fed. (2), p. 729, with these comments: (p. 730) "The writ of habeas corpus may not be used in such cases as an appeal or writ of error to review

proceedings in the State Court"; (p. 731) "The judgment of the State Court is ordinarily *res adjudicata*, not only those issues were raised and determined, but also of those which might have been raised"; (p. 731) "Ordinarily, adjudications made by the State Courts in connection with applications made to them will be binding on the federal Courts". Among many other cases examined are *Smith v. United States*, 187 Fed. (2), p. 192; *Andrews v. Swartz*, 156 U. S., p. 272; *Morton v. Henderson*, 123 Fed. (2), p. 48; *Hawk v. Olsen*, 130 Fed. (2), p. 910; *Eury v. Huff*, 141 Fed. (2), p. 554; and *Feeley v. Ragen*, 166 Fed. (2), p. 976.

In the last case the Court said : (p. 981) "We should [fol. 161] not lose sight of the fact that the Federal Courts are being used to invade the sovereign jurisdiction of the States, presumed to be competent to handle their own police affairs, as the Constitution recognized when the police power was left to the States. We are not super-legislatures or glorified parole boards . . . . When we condemn a State's exercise of its jurisdiction and hold that the exercise of its power is not in accordance with due process, we are in effect trying the States. It is State action that is on trial, and a decent regard for the coordinate powers of the two governments requires that we give due process to the State. That is the reason that in habeas corpus cases the relator must first show that he has exhausted his State remedies to open the way for the Federal Courts to try the State's exercise of its sovereign power. For after all, the States represent the people more intimately than the Federal government . . . . There is no room for crusades or the fulfillment of missions". This, to my mind, is the only proper approach to this delicate question, and any other will mean impairment of respect for both the Courts of the States and the Courts of the United States. The State Courts bow, of course, to the mandates of the Federal Courts, but, no doubt, indulge in respectful resentment of the repeated suggestion that they are incapable of enforcing State laws in accordance with the United States Constitution and in line with principles of justice and fair play.

Conceding, for argument's sake, that the original "jurisdictional test" in cases like this gives way to a new concept



of the scope of matters to be considered in habeas corpus cases under which the test is whether "such a gross violation of constitutional right as to deny to the petitioner the substance of a fair trial", nevertheless, petitioner is not entitled to the relief sought.

[fol. 162] The position that petitioner was denied "the substance of a fair trial" cannot be sustained upon the evidence, including both that taken in the State Court and that taken in this Court.

The findings of fact of the trial Judge, with respect to whether there had been prejudicial discrimination against petitioner in the composition of the jury box from which the trial jury was selected, are set out in the record in the North Carolina Supreme Court, at page 57. And these findings have been adopted as the findings of fact of this Court.

At the hearing before this Court, the Vance County jury boxes-No. 1 and No. 2 were brought before the Court by the Register of Deeds of Vance County, who, under the law of North Carolina, is Clerk to the County Board of Commissioners and as such Clerk holds the custody of the jury boxes for the Board of Commissioners. These jury boxes were opened and the scrolls therein examined, with the purpose of determining how many names of negroes and whites, respectively, had been placed therein when the purge of the jury boxes in July, 1949 was accomplished. As a result of this procedure an agreement between counsel was reached that there were in both boxes, combined at the time of the hearing and, of course, at the time of the drawing of the venire in this case, the names of 145 negroes and the names of 2,081 whites. Each of the persons now living who had any part in the purge of the jury boxes in 1949, to-wit, three of the County Commissioners and the Clerk of the Board, testified that the names which were placed in the jury boxes were taken entirely from the Tax Books of Vance County, and that no person's name was rejected on account of his or her race. All the direct evidence is that there was no discrimination against the negro race as such, and the ratio of negroes to whites in the jury boxes, in the light of the well known fact that the proportion of whites qualified for jury service is much

higher than that of negroes who are so qualified, is not [fol. 163] sufficient, in the Court's opinion, to support the burden resting upon the petitioner to show actual discrimination. The Superior Court Judge so held, and his finding has been upheld by the North Carolina Supreme Court which, upon the first of the three appeals taken by the petitioner, demonstrated its readiness to strike down the findings of a trial Judge in situations of this kind, when required by the ends of justice. On this first appeal (229 N.C., p. 67), it appeared that the trial Judge had found there was no "intentional or purposeful discrimination against the colored race in the selection of jurors." But the Supreme Court of North Carolina refused to accept this finding and said: "A careful persual of the record leaves us with the impression that the findings and rulings of the trial Court on the defendant's motion to quash the indictment are without support in the factual evidence". A new trial was ordered.

No real problem is presented by the evidence which shows that dots were used to identify the names of negroes appearing on the jury scrolls. It is suggested that the circumstance proved discrimination, but there is nothing to the argument. It might be reasonably argued that this device was used to enable those drawing juries to distinguish between names of whites and names of negroes when desired, but in this case the drawing was in the presence of one of petitioner's counsel and every name drawn by the child under ten years of age was entered on the panel or venire, regardless of dots and irrespective of race. As a matter of fact, seven negroes were drawn and served, and four negroes attended the trial as members of the venire; one negro was actually examined on the voir dire, though no negro was actually accepted. It is certainly not enough for petitioner to show a purpose generally on the part of Vance County officials to limit the number of negroes drawn for jury service; he must show by the evidence, [fol. 164] as I read the cases, that discrimination actually occurred in his case in the matter of the composition of the jury which passed upon his rights.

I agree with the Superior Court Judge who tried the petitioner and sentenced him to die, and the Supreme Court

of North Carolina, which, having vacated two former death sentences in the interest of justice, has upheld the trial now questioned and the death sentence imposed as a result. The petitioner failed to prove his allegation of discrimination in the composition of the jury list.

It is decided, therefore, first, that the writ should be vacated and the petition dismissed solely in the light of the procedural history and the record in the State Courts; and, secondly, that in any event, even if petitioner is now entitled to raise the same question passed on in the State Courts, he has failed to substantiate the charge that he did not have a trial according to due process, and is not entitled to his release as prayed.

An order has been entered vacating the writ, dismissing the petition, and remanding the petitioner to the custody of the respondent and the North Carolina authorities for further proceedings under the judgment entered against him nearly two years ago.

This July 12, 1951.

Don Gilliam, United States District Judge.

Addenda: Two other cases decided by our Court of Circuit Appeals seem also to support the conclusion reached above. These are: Stonebreaker v. Smith, 163 Fed. 2nd, 498; and Jerry Adkins v. W. Frank Smith, decided April 10, 1951.

Don Gilliam, United States District Judge.

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[fol. 165] IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

[Title omitted]

ORDER—Filed July 14, 1951

Upon the facts found by the Court and filed separately, and in accordance with the conclusions of law arising thereon, It Is Ordered and Decreed:

1. That the writ of habeas corpus heretofore issued be vacated, and the petition dismissed.

2. That the petitioner be and he is hereby remanded to the respondent and the North Carolina authorities for

further proceedings under the judgment of the Superior Court of North Carolina, and in accordance with its provisions.

3. That the stay of execution under the State Court judgment heretofore entered be and it is hereby vacated.

4. That a certified copy of this Order under the seal of the Court be served by the United States Marshal, or one of his deputies, upon the respondent as his authority for proceeding under the judgment of the State Court.

This 13th day of July, 1961.

Don Gilliam, United States District Judge.





**United States Court of Appeals**  
**For the Fourth Circuit**

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**No. 6331**

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**RALEIGH SPELLER, Appellant,**  
**against**

**JOSEPH P. CRAWFORD, Warden, Central Prison**  
**of the State of North Carolina, Raleigh, N. C.,**  
**Respondent-Appellee**

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**Appendix To Respondent-Appellee's Brief**

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**STATE'S EXHIBIT II**

**SCHEDULE OF JURY SERVICE**  
**BERTIE COUNTY SUPERIOR COURT**  
**AUGUST 29, TERM, 1949**

- LEGEND:**
- S.** Served by Sheriff and member of jury panel.
  - NS** Not to be found by sheriff (not served).
  - EX** Served by sheriff and member of jury panel but excused by Court from jury service.
  - GJ** Member of Grand Jury.
  - PJ** Member of Petit Jury.

The petitioner was tried in a court of general jurisdiction in Bertie County, North Carolina, and he raised the constitutional issue which he is now asking this Court to retry. This issue was decided adversely to petitioner in the State Courts, and being dissatisfied with these decisions, the petitioner is simply asking the Federal Court to use the writ of *habeas corpus* as a substitute for an appeal and thereby retry the issue again. In other words, the Federal Court, according to petitioner's concepts, would be a super court of appeals. We think that we have clearly shown that this is not the proper use of *habeas corpus*. The petitioner had the precise question before this court reviewed by the Supreme Court of North Carolina. The petitioner availed himself fully thereof, and, as we see it, he can not complain and assert that he is entitled to retry the case in the Federal Court, especially since the Supreme Court of the United States, having before it a record of all the proceedings and knowing the seriousness of the situation, saw fit to deny petitioner's application for a writ of *certiorari* in that Court.

Respectfully submitted,

HARRY McMULLAN,  
Attorney General  
of North Carolina.

RALPH MOODY;  
Assistant Attorney General  
of North Carolina.

R. BROOKES PETERS, JR.,  
General Counsel of State  
Highway & Public Works  
Commission.

E. O. BROGDEN, JR.,  
Attorney for State High-  
way and Public Works  
Commission.

Attorneys for Appellee.

<i>Jury or Venire</i>	<i>Name</i>	<i>Vance County Township</i>	<i>Return of Sheriff</i>	<i>Reason</i>	<i>Jury</i>
SPECIAL VENIRE FROM VANCE COUNTY Aug. 29, 1949	Brown, Mollie	7	NS	Dead	
	Eaton, Lucy A.	1	S		PJ
	Henderson, James	5	S		PJ
	Lewis, Clara	6	NS	Dead	
	Plummer, Chesley	5	S		PJ
	Walker, T. J.	5	NS	Dead	
	Wilson, Josephine	7	S		PJ

## STATE OF NORTH CAROLINA

## COUNTY OF BERTIE

I, George C. Spoolman, Clerk of Superior Court of Bertie County, State of North Carolina, which Court is a Court of Record, having an official seal, which is hereto attached and affixed, do hereby certify the foregoing and attached Schedule of Jury Service (One (1) Sheet) to be a true copy of excerpts from Minute Docket No. 13 of Bertie County, said excerpts containing a list of Negro Jurors summoned from Vance County on August 29, 1949, for a special venire from which the jury which tried Raleigh Speller was selected, as the same is taken from and compared with the original now on file in this office. This list includes those not to be found within the county and those who were deceased for the term of court thereon shown.

In witness whereof, I have hereunto set my hand and affixed the seal of the Superior Court of Bertie County at my office in Windsor, North Carolina, this the 17 day of April, 1951, in the year of our Lord, 1951.

Geo. C. Spoolman

Clerk of Superior Court

(Seal)

(DULY EXEMPLIFIED. R. 54-56)



## STATE'S EXHIBIT III

JURY SCROLL, VANCE COUNTY,  
JULY 1, 1949 - JANUARY 8, 1951

## SCHEDULE OF JURY SERVICE

LEGEND: S Served by Sheriff and member of jury panel.

NS Not to be found by sheriff (not served).

EX Served by sheriff and member of jury panel, but excused by Court from jury service.

GJ Member of Grand Jury.

PJ Member of Petit Jury.

Jury or Venire.	Name	Township	Return of Sheriff	Reason	Jury
SPECIAL VENIRE BERTIE COUNTY Aug. 29, 1949	Brown, Mollie	7			
	Eaton, Lucy A.	1			
	Henderson, James	5			
	Lewis, Clara	6			
	Plummer, Chesley	5			
	Walker, T. J.	5			
	Willson, Josephine	7			

\*Our records do not show if served or excused.

SPECIAL VENIRE Oct. 4, 1949	Cunningham, Maggie	2	S		PJ
	Evans, Johnny	5	NS		
	Poole, Marlon	1	S		EX
SPECIAL VENIRE Oct. 11, 1949	Henderson, Edward	6	NS		
SPECIAL VENIRE Oct. 12, 1949	Adams, J. B.	1	S		PJ
	Eaton, Sally A.	1	NS		
	Hunt, Johnny Bell	2	S		EX
	Williams, Robert J.	5	S		PJ
SPECIAL VENIRE CIVIL TERM Dec. 12, 1949	Evans, Lewis	1			
	Revis, Edward L.	1			

\*Jury not used.

REGULAR TERM Jan. 9, 1950	Bullock, E. A.	1	S		GJ
	Wyche, Oliver	1	NS		
REGULAR TERM March, 1950					
1st week	Peoples, W. H.		S		PJ
2nd week	Hanks, Beulah		NS		

<i>Jury or Venire</i>	<i>Name</i>	<i>Township</i>	<i>Return of Sheriff</i>	<i>Reason</i>	<i>Jury</i>
CRIMINAL TERM	Brooks, W. T.	3	S		PJ
June 19, 1950	Vincent, Moses	7	S		PJ
CIVIL TERM	Crudup, John	1	S		PJ
June 26, 1950	Paschall, William	5	S		PJ
*Jury not used.					
CRIMINAL TERM	Crews, William	6	S		GJ
Oct. 2, 1950	Jackson, Thaddeus	1	S		GJ
Oct. 3, 1950	Jones, Pompey J.	1	S		PJ
CIVIL TERM	David, Walter	7	NS		
Oct. 9, 1950					
CRIMINAL TERM	Boyd, Cyrus	3	S		GJ
Jan. 8, 1951	Christmas, Walter	3	S		PJ
	Cousins, William	6	NS		
	Edwards, Frank	3	S		PJ
	Hawkins, Robert	7	NS		
	Henderson, J. A.	4	S		PJ
	Reed, Phil E.	6	S		PJ
	Wimberley, R. E.	1	NS	non-resident	
NO RECORD OF:	Bullock, Moses M.	5			
	Massenburg, Early	7			
	Parham, S. G.	1			
	*Fogg, William	7			

\*In the Superior Court a case against William Fogg was pending charging him with public drunkenness and indecent exposure. In March, 1948 judgment absolute on bond was entered and capias was issued. At June Term, 1949 the State took a Nol Pros with Leave, defendant was not to be found in the county.

# STATE OF NORTH CAROLINA

## COUNTY OF VANCE

I, Henry W. Hight, Clerk of the Superior Court of Vance County, State of North Carolina, which Court is a Court of Record, having an official seal, which is hereto attached and affixed, do hereby certify the foregoing and attached Schedule of Jury Service (Two (2) Sheets) to be a true copy of excerpts from Minute Docket No. 23 of Vance County, said excerpts containing a list of Negro Jurors drawn from the Jury Box which was prepared in July 1949 and showing said jury service from that date until January, 1951, as the same is taken from and compared with the original now on

file in this office. This list includes those not to be found within the county and those who were deceased for the terms of court thereon shown.

In witness whereof, I have hereunto set my hand and affixed the seal of the Superior Court of Vance County at my office in Henderson, North Carolina, this the 3rd day of April, 1951, in the year of our Lord, 1951.

Henry W. Hight  
Clerk Superior Court

(Seal)

(DULY EXEMPLIFIED, R. 50-53)

## STATE'S EXHIBIT IV

CERTIFIED CERTIFICATE OF DEATH  
OF REV. MOSES M. BULLOCK**Certified Certificate of Death**NORTH CAROLINA,  
County of VanceOFFICE OF REGISTER  
OF DEEDS

*This is to certify that* Rev. Moses M. Bullock  
*Sex* Male, *Race* Col., *was born the*      *day of*      , 1  
*and died the* 23 *day of* Aug. 1948, *at the age of* 78 *years*  
*in* Henderson *Township,* Vance *County, State of*  
*North Carolina, U.S.A. Cause of death,* Entuitis Myocarditis  
*Buried in* St. Delight Cemetery, *the* 26 *day of* Aug., 1948.  
*Name of Father* Gilbert Bullock *Name of Mother* Unknown  
*Attending Physician* R. T. Upchurch *Address* Henderson  
*Registration District No.* 91-01 *Certificate No.* 55  
*Filed* 10/1 1948 *H. M. Robinson Local Registrar*  
*According to Records of Vital Statistics of this Office*  
*Vol.* 35 *Page* 185

*WITNESS my hand and official seal, this the* 3rd *day*  
*of* April, 1951.

H. M. Robinson  
 Register of Deeds.

[Official Seal] Vance County, North Carolina.

NORTH CAROLINA

VANCE COUNTY

I, H. M. Robinson, Register of Deeds of Vance County, State of North Carolina, having an official seal, which is hereto affixed, do hereby certify that the foregoing and attached Certificate of Death to be a true copy of the same as taken from and compared with the original now on file in this office.



In witness whereof, I have hereunto set my hand and affixed the seal of the Register of Deeds of Vance County at my office in Henderson, North Carolina, this the 3rd day of April, in the year of our Lord, 1951.

H. M. Robinson  
*Register of Deeds*

(SEAL)

(DULY EXEMPLIFIED, R. 47-49)

## STATE'S EXHIBIT V

JURY SCROLL, GRAND JURY, AUGUST TERM, 1948  
BERTIE COUNTY SUPERIOR COURT

Be it remembered that a regular term of the Superior Court for the County of Bertie is begun and held at the Courthouse in Windsor, North Carolina, on the first Monday before the first Monday in September, 1948, it being the 30th day of August, 1948. His Honor R. Hunt Parker, the Judge assigned by law present and presiding.

E. R. Tyler, Solicitor for the State, present and prosecuting.

The following Grand Jurors who were sworn at the February Term, 1948, to serve for a period for one year are present: C. L. Askew, Alonzo Hoggard, Malcolm Browne, Raleigh Pritchard, E. L. Baker, M. H. Taylor, R. D. Baker, John F. Early and G. P. Perry and George B. Darden, W. A. Tadlock, Jr., R. C. Biggs, negro, T. E. Alston, L. G. Evans, B. F. Hoggard, O. C. Moore, C. L. McCoy and Frank Pritchard, negro, who were drawn by the County Commissioners of Bertie County pursuant to Chapter 171 Public-Local and Private Laws of 1937 are sworn to serve for a period of one year.

NORTH CAROLINA

BERTIE COUNTY

I, Geo. C. Spoolman, Clerk of the Superior Court of Bertie County, North Carolina, do hereby certify the foregoing to be a full, true and correct copy as appears from Minute Docket No. 13 at Page 236 of the Superior Court of Bertie County.

Witness my hand and official seal this the 12th day of April, 1951.

Geo. C. Spoolman

Clerk of the Superior Court of  
Bertie County, North Carolina

(SEAL)

(DULY EXEMPLIFIED, R. 45-46)

## STATE'S EXHIBIT VI

CERTIFICATION OF GRAND JURY SERVICE  
BY R. C. BIGGS AND FRANK PRITCHARD

NORTH CAROLINA

BERTIE COUNTY

J. A. Pritchard, being duly sworn, says: That he is a member of the Bertie County Bar; that he is personally acquainted with R. C. Biggs and Frank Pritchard, both of whom are members of the negro race; that R. C. Biggs and Frank Pritchard were duly sworn as members of the Grand Jury of Bertie County at the August Term, 1948 to serve for a term of one year; that they served upon the Grand Jury of Bertie County at the said August Term 1948, the November Term 1948, the February Term 1949, and the May Term 1949.

J. A. Pritchard

Sworn to and subscribed before me, this the 12th day of April, 1951.

Geo. C. Spoolman  
Clerk of the Superior Court

(SEAL)

(R. p. 64)

NORTH CAROLINA  
BERTIE COUNTY

SUPERIOR COURT  
AUGUST TERM, 1949

STATE OF NORTH CAROLINA  
vs.  
RALEIGH SPELLER

FINDINGS OF FACT AND RULING ON MOTION  
CHALLENGING ARRAY

Upon considering the written motion of defendant filed challenging the entire array of petit jurors and special veniremen summoned from Vance County, and the evidence offered thereon, the Court finds the following facts:

The regular term of Bertie County Superior Court convened at 10 A.M. on Monday, August 29, 1949, and after the organization of the Court the case of STATE v. RALEIGH SPELLER was called for trial, and the defendant was brought in Court and in his presence, and in the presence of his counsel, was duly and legally arraigned to be tried upon a bill of indictment charging him with the capital offense of rape. The defendant pleaded "Not Guilty" upon his arraignment. After the plea the defendant in his own proper person, and by his counsel, filed a written motion and affidavit stating that he could not obtain a fair and impartial trial in Bertie County, and requested that a jury be summoned from some other county for the trial. The Solicitor for the State made no objection to this motion, and requested and stated that counsel for defendant might suggest to the Court the County from which a special venire should be summoned for the selection of a jury. Defendant's counsel suggested that the venire from which the said jury should be selected be summoned from the most remote county in the Third Judicial District, the same being Vance County. Following the suggestion of defendant's counsel, and with the consent of the Solicitor for the State, the Court ordered that a venire of 100 jurors be summoned from Vance County, and that said special venire be drawn from jury Box No. 1 of Vance County in



the manner provided by law, and in the presence of the defendant, Raleigh Speller, and one or more of his attorneys, and in the presence of the Solicitor for the State.

With the consent of counsel for defendant and the Solicitor for the State this special venire was drawn in the Court house in Vance County at 4:30 P.M. on August 29, 1949, in the manner provided by law, and in the presence of the defendant, Raleigh Speller, one of his attorneys, Herman L. Taylor, and also E. R. Tyler, Solicitor.

That the names of the persons drawn from said jury box were duly certified by the Clerk of the Superior Court of Vance County to the Sheriff of Vance County, and of the 100 names so selected in said special venire, 63 of said jurors reported and were present at the Courthouse in Windsor, North Carolina, at 10:30 A.M. on August 31, 1949. That the 37 jurors not appearing consisted of some who could not be found by the Sheriff of Vance County or his deputies; that a number were not physically able to attend court and presented to the Court doctor's certificates certifying as their illness and inability to attend court and serve as jurors; that of the 100 jurors drawn for the special venire, 7 were members of the negro race, and of the number reporting at the Courthouse in Windsor, N. C. for jury duty 4 were negroes.

The Court finds as a fact that the special venire from Vance County was drawn in compliance with the General Statutes of North Carolina, Chapter 9, Sections 1, 2, 3 and/or 9 and the Constitution and laws of the United States.

After said special venire reported for jury duty in Bertie County on August 31, 1949, and before the selection of the petit jury was begun, defendant filed, in writing, a motion and challenge to the entire array, which motion appears in the record. The Court directed the Solicitor for the State and counsel for defendant to proceed with the selection of a jury advising the defendant's counsel that they would be given ample time to present evidence upon said motion. Whereupon, after the defendant was properly warned, selection of the jury was begun for the trial of the defendant.

Defendant's counsel exhausted 14 peremptory challenges before the twelfth juror was selected, and upon the twelfth juror being presented again peremptory challenged said juror, which the Court disallowed for the reason that defendant had theretofore exhausted all challenges allowed him by the laws of North Carolina.

Thereupon the Court ordered the juror properly sworn and seated.

The Court then inquired of defendant's counsel the time they needed to prepare and present evidence upon the motion and challenge to the array. Defendant's counsel stated that they would be ready to go into the hearing on this motion as soon as witnesses, which they desired from Vance County, could be summoned and report to the Court. Subpoenae were issued at the instance of defendant's counsel for the Sheriff of Vance County, Clerk of the Superior Court of Vance County, the five members of the Board of County Commissioners of Vance County, the Tax Collector for Vance County, and the Register of Deeds of Vance County, who were duly summoned and appeared in Court with the records of persons drawn for jury service in Vance County for the past 15 years; also at request of defendant's counsel the jury box of Vance County was brought into Court.

The foregoing witnesses, with records requested, appeared at the Courthouse in Windsor, N. C. on Thursday, September 1, 1949, and the defendant's counsel offered as witnesses in behalf of their motion, the Register of Deeds and Clerk to the Board of County Commissioners of Vance County, the Sheriff of Vance county, the Tax Collector of Vance County, and the Chairman of the Board of County Commissioners of Vance County, and several members of the colored race.

At the request of defendant's counsel the jury box of Vance County was opened in the presence of the Court and the officials of Vance County, and the scrolls contained therein were examined. The Court finds that of the scrolls examined from Jury box No. 1 more than 100 scrolls contained the names of members of the negro race, and there

were several hundred of the other scrolls in jury Box No. 1, that no evidence was offered as to whether the names appearing thereon were members of the white or colored race.

The Court further finds that all of said scrolls contain the name of the person, and after the name a number which designates the Township in which said person resides in Vance County, and that on some of the scrolls between the name of the person and the number of the Township in which said person resides, there appears a dot or period, but there is nothing on said scrolls to indicate whether the name on said scroll is that of a colored or a white person, the dot or period appearing upon scrolls that contain names of both white and colored persons. The Court further finds that the names upon said scrolls were typewritten, and were written by more than one typist.

The Court further finds that the jury box for Vance County was purged and revised on the first Monday in July 1949, in full compliance with the law, and that at said time the said commissioners of Vance County caused the names on the jury list to be copied on small scrolls of paper of equal size, and put into a properly divided jury box, which said box was locked with two locks, and one of the keys kept by the Sheriff of Vance County, and the other by the chairman of the Board of Commissioners of Vance County, and the jury box kept by the Clerk to the Board.

The Court further finds that in the purging of said jury list, and causing the names of persons to be placed in jury box No. 1 for jury services in Vance County, that there was nothing said or done in the selection and in the passing upon the qualifications of said jurors to intentionally or purposefully discriminate or exclude in any manner or form, members of the negro race from said jury box, and that the said commissioners of Vance County have placed the names of such persons of both white and colored races in said jury box as they found possessed intellectual qualifications and moral character, and met all requirements of law as provided by Chapter 9 of the General Statutes of North Carolina, regardless of race, color or creed.

The Court further finds that of the 44 persons examined from the special venire as prospective jurors, there were five white persons ranging in age from 39 to 70 years; who stated that they had never before been summoned for jury service in Vance County.

The Court further finds that the officials, whose duty it is and was to prepare the jury list, and draw the panel of veniremen summoned by the Sheriff of Vance County, from which the special venire was drawn for the trial of this cause, have not selected and summoned jurors for said special venire in violation of the General Statutes of 1943, Chapter 9, Sections 1, 2, 3 and/or 9, and the Constitution and laws of the United States with the unlawful and avowed purpose of discriminating against persons of the negro race.

The Court further finds that the defendant has failed to offer any evidence to show any act or conduct on the part of the officers of Vance County, upon whom the law imposes the duty of preparing the jury list, to show any discrimination or disproportionate representation of qualified jurors of the negro race, nor is there evidence that a single negro, who at the time of the selection of said jury list by said Board of Commissioners qualified to serve upon the jury, has been excluded from said jury list.

The Court further finds that defendant's counsel stated at the close of the evidence offered upon their motion, that they desired to offer no additional evidence in support of said motion.

Thereupon, it is ordered, considered and adjudged that the aforesaid motions made by the defendant, Raleigh Speller, and his counsel be, and they are hereby denied.

W. I. HALSTEAD,  
Special Judge, Presiding.

Defendant EXCERPTS to foregoing findings of fact and ruling.

EXCEPTION NO..... (S.R. 57-63)



## STATUTES

## Chapter 7, General Statutes of North Carolina:

§ 7-63. *Original jurisdiction.*—The superior court has original jurisdiction of all civil actions whereof exclusive original jurisdiction is not given to some other court; and of all criminal actions in which the punishment may exceed a fine of fifty dollars, or imprisonment for thirty days; and of all such affrays as shall be committed within one mile of the place where, and during the time, such court is being held; and of all offenses whereof exclusive original jurisdiction is given to justices of the peace, if some justice of the peace shall not within twelve months after the commission of the offense proceed to take official cognizance thereof.

## Chapter 14, General Statutes of North Carolina:

§ 14-21. *Punishment for rape.*—Every person who is convicted of ravishing and carnally knowing any female of the age of twelve years or more by force and against her will, or who is convicted of unlawfully and carnally knowing and abusing any female child under the age of twelve years, shall suffer death: Provided, if the jury shall so recommend at the time of rendering its verdict in open court, the punishment shall be imprisonment for life in the state's prison, and the court shall so instruct the jury.

## Chapter 9, General Statutes of North Carolina:

§ 9-1. *Jury list from taxpayers of good character.*—The board of county commissioners for the several counties, at their regular meetings on the first Monday in June in the year 1947, or the jury commissions or such other legally constituted body as may in the respective counties be charged by law with the duty of drawing names of persons for jury service, at the times of their regular meetings, and every two years thereafter, shall cause their clerks to lay before them the tax returns for the preceding year for their county, and a list of names of persons who do not appear upon the tax lists, who are residents of the county and over twenty-one years of age, from which lists the board of

county commissioners or such jury commissions shall select the names of such persons who reside in the county who are of good moral character and have sufficient intelligence to serve as members of grand and petit juries. A list of the names thus selected by the board of county commissioners or such jury commissions shall be made out by the clerk of the board of county commissioners or such jury commissions and shall constitute the jury list of the county and shall be preserved as such.

The clerk of the board of county commissioners or such jury commissions, in making out the list of names to be laid before the board of county commissioners or such jury commissions, may secure said lists from such sources of information as deemed reliable which will provide the names of persons of the county above twenty-one years of age residing within the county qualified for jury duty. There shall be excluded from said lists all those persons who have been convicted of any crime involving moral turpitude or who have been adjudged to be non compos mentis.

• § 9-2. *Names on list put in box.*—The commissioners at their regular meeting, on the first Monday in July in the year nineteen hundred and five, and every two years thereafter, shall cause the names on their jury list to be copied on small scrolls of paper of equal size and put into a box procured for that purpose, which must have two divisions marked No. 1 and No. 2, respectively, and two locks, the key of one to be kept by the sheriff of the county, the other by the chairman of the board of commissioners, and the box by the clerk of the board.

§ 9-3. *Manner of drawing panel for term from box.*—At least twenty days before each regular or special term of the superior court, the board of commissioners of the county shall cause to be drawn from the jury box out of the partition marked No. 1, by a child not more than ten years of age, thirty-six scrolls except when the term of court is for the trials of civil cases exclusively, when they need not draw more than twenty-four scrolls. The persons whose

names are inscribed on said scrolls shall serve as jurors at the term of the superior court to be held for the county ensuing such drawing, and for which they are drawn. The scrolls so drawn to make the jury shall be put into the partition marked No. 2. The said commissioners shall at the same time and in the same manner draw the names of eighteen persons who shall be summoned to appear and serve during the second week, and a like number for each succeeding week of the term of said court, unless the judge thereof shall sooner discharge all jurors from further service. The said commissioners may, at the same time and in the same manner, draw the names of eighteen other persons, who shall serve as petit jurors for the week for which they are drawn and summoned. The trial jury which has served during each week shall be discharged by the judge at the close of said week, unless the said jury shall be then actually engaged in the trial of a case, and then they shall not be discharged until the trial is determined.

§ 9-6. *Jurors having suits pending.*—If any of the jurors drawn have a suit pending and at issue in the superior court, the scrolls with their names must be returned into partition No. 1 of the jury box.

§ 9-7. *Disqualified persons drawn.*—If any of the persons drawn to serve as jurors are dead, removed out of the county, or otherwise disqualified to serve as jurors, the scrolls with the names of such persons must be destroyed, and in such cases other persons shall be drawn in their stead.

§ 9-8. *How drawing to continue.*—The drawing out of partition marked No. 1 and putting the scrolls drawn into partition No. 2 shall continue until all the scrolls in partition No. 1 are drawn out, when all the scrolls shall be returned into partition No. 1 and drawn out, when all the scrolls shall be returned into partition No. 1 and drawn out again as herein directed.

§ 9-19. *Exemptions from jury duty.*—All practicing physicians, licensed druggists, telegraph operators who are in the regular employ of any telegraph company or railroad

company, train dispatchers who have the actual handling of either freight or passenger trains, regularly licensed pilots, regular ministers of the gospel, officers or employees of a state hospital for the insane, active members of a fire company, funeral directors and embalmers, printers and linotype operators, all millers of grist mills, all United States railway postal clerks and rural free delivery mail carriers, locomotive engineers, brakemen and railroad conductors in active service, radio broadcast technicians, announcers, and optometrists, registered or practical nurses in active practice and practicing attorneys at law, and all members of the national guard. North Carolina state guard and members of the civil air patrol, naval militia, officers reserve corps, enlisted reserve corps, and the naval reserve, who comply with and perform all duties required of them as members of the national guard, naval militia, officers reserve corps, enlisted reserve corps, and the naval reserves, shall be exempt from service as jurors.

§ 9-24. *How grand jury drawn.*—The judges of the superior court, at the terms of their courts, except those terms which are for the trial of civil cases exclusively, and special terms for which no grand jury has been ordered, shall direct the names of all persons returned as jurors to be written on scrolls of paper and put into a box or hat and drawn out by a child under ten years of age; whereof the first eighteen drawn shall be a grand jury for the court; and the residue shall serve as petit jurors for the court.

§ 9-29. *Special venire to sheriff in capital cases.*—When a judge of the superior court deems it necessary to a fair, and impartial trial of any person charged with a capital offense, he may issue to the sheriff of the county in which the trial may be a special writ of venire facias, commanding him to summon such number of persons qualified to act as jurors in said county as the judge may deem sufficient (such number being designated in the writ), to appear on some specified day of the term as jurors of said court; and the sheriff shall forthwith execute the writ and return it to the clerk of the court on the day when it is returnable, with names of the jurors summoned.



§ 9-30. *Drawn from jury box in court by judge's order.*—

When a judge deems a special venire necessary, he may, at his discretion, issue an order to the clerk of the board of commissioners for the county, commanding him to bring into open court forthwith the jury boxes of the county, and he shall cause the number of scrolls as designated by him to be drawn from box number one by a child under ten years of age. The names so drawn shall constitute the special venire, and the clerk of the superior court shall insert their names in the writ of venire, and deliver the same to the sheriff of the county, and the persons named in the writ and no others shall be summoned by the sheriff. If the special venire is exhausted before the jury is chosen, the judge shall order another special venire until the jury has been chosen. The scrolls containing the names of the persons drawn as jurors from box number one shall, after the jury is chosen, be placed in box number two, and if box number one is exhausted before the jury is chosen, the drawing shall be completed from box number two after the same has been well shaken.

H. M. ROBINSON (State Record) BEING RECALLED FOR FURTHER EXAMINATION BY DEFENDANT, TESTIFIED IN PART AS FOLLOWS:

### RE-DIRECT EXAMINATION

COURT: Do you mean to testify that you know they are the names of colored people on the scrolls by reason of a dot being there?

A. No, sir; if I know him as John Jones, I know him, and that is the only way I know. . . . Luther H. Fuller is colored; I do not see a dot there. Peter B. Small, I don't know him; dot by name. Mabel Jackson, colored; dot by name. Peter Harris, I don't know; dot by name. Frank D. Bullock, colored; dot by name. . . . Clarence Green, I only know a white Clarence Green; dot after his name. W. T. Brooks, I don't know; dot by name. E. A. Jordan, colored; dot after name. . . . Ella Davis Lee, I don't know; there is a white lady by the name of Lee but I don't know; dot by that name. . . . Johnny Crudup, we have a John Crudup who works in the bank and he is white; dot by that name. . . . C. H. Hendricks, he is white and lives in the Sandy Creek Township; has a dot by that name. . . . Louis Smith, I think he is white; the only Smiths I know in that Township are white; dot by name. . . . Robert E. Wyche, I think he is white; dot by name. . . . Nelson H. Hicks, the only people I know in that Township by name of Hicks are white; dot by name. . . . John A. Hall, white; dot by his name. . . . Fred Brame, I think he is white; dot by name. (S.R. 46, 47, and 48).

H. M. ROBINSON (State Record) TESTIFIED IN PART AS FOLLOWS:

### CROSS EXAMINATION BY THE STATE

Q. Was there in the purging and revision of this jury list any systematic purpose or effort to exclude any member of the colored race on account of their color?

- A. There was not.
- Q. I ask you if the jury box from which the special venire was drawn for this trial was composed of both white and colored jurors in fair proportion to the number among the races, and the people who were qualified from both races from a moral standing and character, and moral fitness to serve as jurors?
- A. It was. The ratio of colored people to white in Vance County is about 35 per cent colored people.
- Q. Do you know of anything, or see any act done, anything said that would have for its purpose the exclusion of names of Negroes, or members of the Negro race from the jury box of your County on this occasion?
- A. No.

(S.R. 21-22)

H. M. ROBINSON BEING RECALLED TESTIFIED IN PART AS FOLLOWS:

#### EXAMINATION BY THE COURT

These scrolls were made up under my supervision. The lists were made up for the jury list to be revised, and when they went over the lists some of the names were dotted and some were marked out, and those marked out were cut out and thrown away. (S.R. 45)

E. A. COTTRELL (State Record) AGAIN RECALLED FOR EXAMINATION BY DEFENDANT TESTIFIED AS FOLLOWS:

#### CROSS EXAMINATION

We do not identify anybody from these scrolls by the dots or periods; the way we draw the scrolls is by a child under ten years of age. The Deputy Sheriff or myself bring in a child and keep the scrolls stirred up. The only time we put our hands in the box is to stir them up, and the child reaches in and pulls out one at a time. And I pass it to the Chairman of the Board of

Commissioners, and he calls out the name and two or three different people put down the names, and that is what was done when this special venire were drawn for the Speller case.

Q. Was the special venire drawn from the box on Monday without any discrimination whether it was a colored or white person?

A. There was no discrimination, and I have never seen or heard tell of those dots before today.

Q. Was there any discrimination practiced in the drawing of that special venire?

A. No, sir, there was no discrimination.

Q. Were the names then copied by two different people in the office and a list made of the persons drawn?

A. Yes, and this done in the presence of the defendant and of defendant's counsel. There were not any names put aside drawn for this special venire.

(S.R. 50-51)

G. W. KNOTT (State Record) TESTIFIED IN PART AS FOLLOWS:

#### DIRECT EXAMINATION BY THE STATE

I am a farmer and member of the Board of Commissioners of Vance County, and have been a member for five years. I was present at the July 1949 meeting.

Q. At that meeting I ask you whether or not the jury boxes of Vance County were purged by the Board of Commissioners?

A. They were.

Q. I ask you to state whether or not at the beginning of the purge all scrolls theretofore in the jury boxes were taken out and destroyed?

A. They were.

Q. In making up the new jury list I ask if the Board of Commissioners of Vance County placed in jury box No. 1 the names of persons who were residents and taxpayers of Vance County who had paid their taxes



for the preceding year, and who were persons of good moral character, and in the opinion of the Board of Commissioners of Vance County were qualified to serve as jurors, without any purposeful discrimination as to race, color or creed?

\* \* \* \* \*

A. Yes, those scrolls were presented to the Board in their entirety. They were passed around to the commissioners and we looked over the lists. Those whom we knew to be dead, or who had criminal records, insane, or in County Hospital and incompetent—we struck those names off, both white and colored. From the scroll lists I did not know the white from colored, just the names. After that was done then the scrolls list was passed to the Clerk to the Board and to the members of the Board, and they were clipped off with scissors and put in Box No. 1. Colored persons' names were put into the jury box, I saw that with my own eyes. There was no discrimination with the colored or white names by the Board of Commissioners.

Q. Was there anything on the actual scroll placed in the box to discriminate as between the races?

\* \* \* \* \*

A. There was not; absolutely I heard none. The jury box has been purged every two years since I have been a commissioner. (S.R. 33)

G. W. KNOTT, BEING RECALLED BY THE STATE  
TESTIFIED AS FOLLOWS:

EXAMINATION BY MR. PRITCHETT  
RE-DIRECT EXAMINATION

That I have been on the Board of Commissioners for 5 years.

Q. The dots appearing upon any scrolls in the jury box, I ask if they were put there for the purpose of discrimination of jurors, as to whether they were white or colored?

\* \* \* \* \*

- A. In looking over and observing the scrolls I have never found any dots. There may have been some on there but I have never observed a single dot while I was looking at them..
- Q. Have you, or any of the other commissioners, in this purging of your jury box, caused to be placed on any scrolls in the jury box any dot or period for the purpose of designating whether the juror was white or colored?

A. We have not. (S.R. 53)

L. B. FAULKNER, (State Record) BEING RECALLED BY THE STATE, TESTIFIED:

#### RE-DIRECT EXAMINATION BY SOLICITOR

- I am the Deputy Sheriff of Vance County, and that the Sheriff and I was present when the special venire was drawn for the case of STATE v. RALEIGH SPELLER in the courthouse of Vance County. My little daughter, Carolyn Faulkner, age 6 years, drew the names from the jury box No. 1. And that is the jury box counsel for defendant have been examining here today and found 104 scrolls of colored people. Only one name was stricken out after it was drawn from the jury box, it was that of J. B. Satterwhite; he is sick and it was so announced. All agreed that it be stricken.
- Q. Was there any discrimination in drawing the names from Box No. 1 against negroes or any other race?
- A. I read the names as the little girl handed them to me; there was no discrimination of any kind.

#### QUESTIONS BY THE COURT:

Yes, I summoned some of these jurors, and I read the names as they were drawn from the box, and I could

not tell by looking at the scrolls whether they were white or colored, by the dots or periods.

### EXAMINATION BY THE STATE CONTINUED

There were seven colored people drawn in this special venire. (S.R. 54)

MARK C. WOODLIEF, (State Record) BEING RECALLED BY THE STATE, TESTIFIED:

### RE-DIRECT EXAMINATION BY THE STATE

There was no mark placed on the scrolls to designate whether that name was colored or white.

Q. Has any dot, period or mark been placed on the scroll or name appearing in the jury box for the purpose of discriminating as between the races?

\* \* \* \* \*

A. No, and never heard of it before today.

F. H. ELLINGTON, (State Record) WITNESS FOR DEFENDANT, TESTIFIED AS FOLLOWS:

### CROSS-EXAMINATION BY THE STATE

I am Chairman of the Board of Commissioners, and this special venire were drawn Monday from the boxes in Vance County after the boxes were purged in July of this year.

Q. Has there been, since you have been Chairman or any time, any purposeful discrimination as between the races, colored and white, in any of the names put in the jury box when it was purged?

\* \* \* \* \*

A. No there has not, and at no other time in our county to my knowledge. The commissioners select names of the jury from the tax books, it would be hard to say

what names we select; we just go down the line in the tax books.

Q. In selecting these names from the tax lists were they selected from the standpoint of law abiding citizens, taxpayers and persons of good moral character?

\* \* \* \* \*

A. Yes, and I followed that proceeding in the selection of the names of colored people. (S.R. 16-17)

F. H. ELLINGTON, (State Record) BEING RECALLED BY THE STATE, TESTIFIED AS FOLLOWS:

#### RE-CROSS EXAMINATION BY THE STATE

Q. Did you know until the jury box was opened here to-day there was any period or other marking appearing after the name on any scroll in the jury box, and before the township number?

A. No.

Q. Was any period, dot or other marking placed upon any of the scrolls in the jury box of Vance County when it was purged for the purpose of designating whether the name appearing on the scroll was the name of a white or a colored person?

\* \* \* \* \*

A. No.

Q. Was any period, dot or other marking placed after the name on any scroll appearing in the jury box of Vance County when it was purged in July of this year, for the purpose of discriminating as between the races?

\* \* \* \* \*

A. There was not.

Q. Did the County Commissioners of Vance County intentionally cause to be placed upon the scrolls opposite the names of any jurors, or prospective jurors in Box No. 1 of Vance County, any dot, period or marking for the purpose of intentionally discriminating between the races?

\* \* \* \* \*



A: No, sir. (S.R. 56).

MARK WOODLIEF (Federal Transcript) TESTIFIED  
AS FOLLOWS:

CROSS EXAMINATION BY MARK WOODLIEF  
BY MR. RHODES

- Q. This list was brought by Mr. Robinson according to the instructions of the board of county commissioners?
- A. Yes, sir.
- Q. Brought to the board and the board checked the list?
- A. That's right.
- Q. At that time was there anything on the list which would indicate to you whether a man was a negro or white man?
- A. No, sir.
- Q. Was the question discussed at that time as to whether or not any particular person was negro or white man?
- A. No, sir, or I didn't know it.
- Q. Was the race question raised in the purging of this box?
- A. No, sir.
- Q. When you looked over this list did you see the dots before or after the names of any persons?
- A. I didn't see any dots.
- Q. If there were any dots upon that list at the time submitted to the board did it indicate to you as to whether or not the person before or after whose name it appeared was a negro or white man?
- A. No, sir, I wouldn't have known the difference. I just knew the man.
- Q. I will ask you to state whether or not the county commissioners of Vance County in purging the jury placed in box No. 1 the names of all persons whom the board determined to be residents and taxpayers of Vance County who had paid their taxes for the preceding year and were of good moral character and sufficient intelligence irrespective of race?

THE COURT: His question was did you do that without regard to whether a person was white or colored?

A. Yes, sir, put them all in.

Q. To your knowledge was the name of any negro eliminated from the list submitted to the board?

A. No, sir.

Q. You stated that the list was turned back to Mr. Robinson with instructions that he place those names in the jury box?

A. Yes, sir.

F. H. ELLINGTON (Federal Transcript). TESTIFIED AS FOLLOWS:

CROSS EXAMINATION OF F. H. ELLINGTON  
BY MR. RHODES

Q. Mr. Ellington, Mr. Robinson is clerk to your board of county commissioners?

A. Yes, sir.

Q. When you got ready to purge this box you requested him to furnish you or the board of county commissioners with a list from which the board of county commissioners selected the names to go in the box?

A. Yes, sir.

Q. You know for how many years he has been doing this?

A. No, sir, I don't. Mr. Robinson has been register of deeds for quite a while.

Q. When he brought the list in to you you took the list and went around to each commissioner and each commissioner checked the list?

A. Yes, sir.

Q. And then when the list had been checked it was turned back to Mr. Robinson with instruction to place those names in the jury box?

OBJECTION BY PETITIONER

Q. After the list had been checked by the board of county commissioners I ask you what instructions, if any, you

gave to Mr. Robinson as to what he was to do with those names?

A. I don't remember the exact words but it was understood he would cut them up in strips and put them in the box.

Q. Did you instruct him to put them in the box?

A. Yes, sir.

Q. Then the first list drawn out of that box after it was purged was at the trial of this case?

A. I don't know. I wasn't present.

Q. Were you present at the selection of the special venire to go to Bertie County?

A. No, sir.

THE COURT: When was it drawn?

A. August, 1949.

MR. BROGDEN: That was the first list drawn out of the box.

Q. Were you present at the hearing in Bertie County?

A. Yes, sir.

Q. I ask you whether or not you knew of any dots which appeared on the names of any list prior to the time they were drawn out of the jury box in Vance County?

A. No, sir.

Q. Did you put any dots before or after the name of any person?

A. No, sir.

Q. See any member of the board of county commissioners do that?

A. No, sir.

Q. In the selection of the names which went in the jury box state whether or not any consideration was given as to whether that person was a negro or a white person?

A. No, sir.

Q. State whether or not you had any way of knowing whether or not names put in the box or taken out of the box were either negroes or white except your personal knowledge of the man?

A. No, sir, that was the only way I could identify them.

- Q. What was the basis of the selection of the names that went in the box? What did you take into consideration?
- A. Well, a man's reputation, whether I knew him, or whether I knew the man guilty of being in court a lot, or physically handicapped. Of course some of them might have been put in like that but if so I didn't know the man.

W. H. BLACKNALL (Federal Transcript) TESTIFIED  
AS FOLLOWS: -

CROSS EXAMINATION OF W. H. BLACKNALL  
BY MR. RHODES

- Q. The list was brought to you by the clerk to the board?
- A. Yes, sir.
- Q. He brought the list made up from the tax list?
- A. Yes.
- Q. And the list circulated around to the board?

OBJECTION BY PETITIONER

MR. GATES: I don't think it fair and competent for counsel to lead him, ask him questions and he say "Yes" and "No".

THE COURT: I see no objection to the cross examination so far. Just be careful about it.

- Q. You stated you did mark off two or three names. You know whether they were white or black?
- A. No, I don't remember.
- Q. As to the names stricken off by various members of the board, did you hear any discussion as to whether or not any of them were negroes or whites?
- A. No, sir, I didn't.
- Q. In going over this list did you observe any dots before or after any names of persons whose names appeared thereon?
- A. No, sir.
- Q. In looking at that list did you have any way to tell from the list other than your personal knowledge of



the man as to whether or not the person named on the list was negro or white?

A. No, sir.

Q. And that list was turned back to the register of deeds who was clerk to your board?

A. That's right.

Q. What instructions if any did you give him as to what to do with the list?

A. Didn't give him any instructions. It was customary that he should put them in the jury box.

Q. Did you ever suggest to Mr. Robinson that he in any way eliminate from the list submitted to the commissioners the names of any negroes?

A. No, sir.

Q. Ever discuss with him the question of placing dots before or after any particular name on the list?

A. No.

Q. When you passed upon that list what was the basis of your approval of the list?

A. If any commissioner knew of any cause why he didn't think a person was eligible to serve on the jury we marked it out.

Q. Did that apply to negro and whites alike?

A. Yes, sir.

Q. The action that was taken in approving this list, was that taken just by individual members of the board or by the board as a body?

A. By the board as a body.

Q. Mr. Blacknell, have you ever heard the question discussed before the board of county commissioners or by the board of county commissioners as to whether or not any negro's name should be eliminated from the jury box?

A. No, I never have.

Q. Did you place all names in there irrespective of whether or not they were black or white?

A. Yes. If no cause for marking it out we left it on the list.

Q. Would you say that a person who was a negro that

his name was eliminated from the box solely because he was a negro?

A. No, sir.

Q. Were you in the courtroom in Bertie County?

A. Yes, sir.

Q. State whether you had any knowledge of whether dots were before or after the names of any person?

A. Never heard of those dots until it was brought up in Bertie County.

Q. You now know why they were put on there?

A. No, sir.

Q. If there were any dots after the names on the list would that indicate to you whether they were black or white?

A. No, sir.

Q. You know anything about the race of persons who have served on the jury since July, 1949?

A. You mean has any negro been drawn?

Q. Yes.

A. I don't remember.

Q. You don't know of your own knowledge whether negroes served on the jury or were drawn from the jury box to serve on the jury in Vance County either before 1949 or after 1949?

A. No, I don't.

\* \* \* \* \*

RE-CROSS EXAMINATION OF W. H. BLACKNALL  
BY MR. RHODES

Q. To your knowledge has the name of any person been eliminated from the list of names drawn from the jury box because of any dot appearing before or after the name?

A. No, sir.

E. A. COTTRELL (Federal Transcript) TESTIFIED AS  
FOLLOWS:

CROSS EXAMINATION OF SHERIFF COTTRELL  
BY MR. BROGDEN

- Q. You couldn't testify that you actually never saw any negroes on the jury prior to 1949?
- A. I don't remember but it seems to me one or two but I am not certain.
- Q. You mentioned that you had been at every term of court?
- A. I haven't skipped a term of court there in twenty years.
- Q. Have you seen any negroes on the jury recently?
- A. Yes.
- Q. What terms of court?
- A. October and January.
- Q. How many on the jury in October?
- A. Five I think. Four I know. Three in October and four or five, I know four at the January term of court.
- Q. You have any members of the negro race on the grand jury?
- A. Yes, one or two and they asked the foreman to excuse them.
- Q. Any of them serve?
- A. Not on the grand jury. Two of them served on the October jury. Stayed there all the time.
- Q. You say you send out post cards for the regular jury?
- A. I send them a card. It is a double card. They sign that card that they will accept service, tear that off and return it.
- Q. If the card is not returned what do you do?
- A. Mark on it not served.
- Q. Do you on occasions try to find them?
- A. If no one answers to the name the Judge has to have an excuse why they won't serve. Either sick or out of the county.
- Q. You attempt to serve every one on the list?
- A. Yes, sir. Sometimes the card comes back and the mail man says not to be found. Therefore we report back to the court.
- Q. You haven't given instructions to your deputies not to serve people because they are of the negro race?
- A. No, sir.
- Q. You haven't failed to serve any one of the negro race?
- A. No.

- Q. You serve every one on the list brought to you?  
A. Ye sir.  
Q. And your deputies are instructed to do that?  
A. Yes.  
Q. How are you paid?  
A. Paid by the names. We get fifty cents apiece for every juror summoned. County auditor pays it to us.  
Q. You are on salary?  
A. Yes. We don't get the fee. Take it out of one pot and put it back in another pot.  
Q. Was Thaddeus Jackson on the grand jury?  
A. He was on there in October?  
Q. He did serve on the grand jury?  
A. Yes, him and another one.  
Q. How is your grand jury selected?  
A. Twice a year. Each one serves six months.

THE COURT: You draw nine at the time?

- A. No, sir, the whole eighteen is drawn at once.  
Q. You don't have the stagger system?  
A. No, sir.  
Q. Were you at the October term of Court, 1949 when they had quite a few special venires for the Carolina Light and Power Company?  
A. Yes.  
Q. Were any negroes drawn on jury duty at that term of court?  
A. Yes.  
Q. About what would your estimate be of the number drawn?  
A. Four or five. I never paid any attention to them. After, I send them out I throw the cards away. The Clerk keeps a list of the jury and we don't bother with it.  
Q. How about the term the first part of 1950, January, 1950?  
A. I can't remember back.  
Q. Do you remember whether a man by the name of Bullock was on the grand jury. E. A. Bullock?  
A. Yes, E. A. Bullock, high school teacher in Henderson.



THE COURT: Was he on the grand jury?

A. Yes, sir.

Q. How about the June term, 1950?

A. I can't recall right off-hand. We have had so many since then.

Q. Isn't it common knowledge or from your own personal knowledge isn't it true that negroes have consistently served on grand and petit juries from July, 1949 until the present date?

A. Yes, sir. This last grand jury two on there that asked the foreman to excuse them because they had work to do.

Q. I was in your office one day and several people wanted to know if they could be excused?

A. Uncle Jim Henderson came in.

Q. What does your department tell them?

A. Told them no way I could excuse them. They would have to go before the Judge, that that was his business and he would have to excuse them.

Q. You never excused anybody?

A. Unless I know unable to get there and I put the reason not served. I know this last court I was sitting in my office and Robert Hawkins came in and brought the card and asked me to excuse him and I knew he was in a critical condition, and has since died, and I told her to forget him.

Q. If you serve a man it is made an official record of the court?

A. Yes, sir.

Q. Do the county commissioners in any way consult you about any one?

A. Myself or one of the other officers always present when they draw the jury out of the box. We have a little girl or child under ten years old.

Q. Were you present when the Bertie venire was drawn?

A. I wasn't there but my deputy, Mr. Falkner, was there.

Q. Was Mr. Falkner there all the time?

A. Yes, sir. His little girl drew the jury.

Q. You get personal service when you have a special venire?

A. Either call them over the telephone or go to see them direct.

Q. You followed the same procedure in that as with the post card, you try to summon everybody on the list?

A. Yes, and if we send the cards out I go a day or two before court and check the cards back and those who haven't sent cards back if we can contact them by telephone we call them and if we can't get them we make an effort to see him.

Q. You make an effort to see that every juror is served?

A. Yes, sir, have to do it or the Judge will want to know why.

Q. I direct your attention to the present term of court you are having. Is J. A. Henderson one of the jurors serving at the January Term, 1951?

A. He didn't serve. He came up and got excused.

Q. He was summoned?

A. Yes, and brought his card in.

Q. How about Philip E. Reed?

A. No served the past term.

Q. Were both of those two negroes?

A. Yes, sir. I know them very well.

Q. How about R. E. Wimberly?

A. I will be fair with you I don't know R. E. Wimberly.

Q. How about Frank Edwards?

A. I know him.

Q. Did he serve?

A. Yes, sir.

Q. And he is a negro?

A. Yes, sir.

Q. How about William Cousins, Sr.?

A. He was summoned from No. 6.

Q. Did he serve?

A. This last court?

Q. Yes.

A. I think he did. I think he stayed in the courthouse the whole week.

- Q. What about Walter Christmas?
- A. He served.
- Q. He is a negro?
- A. Yes, sir.
- Q. How about Cyrus Boyd?
- A. He served. He lives in town.
- Q. He is a negro?
- A. Yes, sir.
- Q. The last term of court there were a considerable number?
- A. Four or five that served.
- Q. Two could have been jurors but they asked to be excused?
- A. Yes, sir. My information from the foreman was he wanted to be excused.
- Q. From your personal knowledge would you say this situation is typical of most grand and petit juries from 1949 to date?
- A. Yes, sir.
- Q. Do you have any personal knowledge about the dots on the jury list? Did you put any on there or observe anybody putting them on there?
- A. No, sir, never heard of the dots until down in Bertie County.

L. B. FAULKNER (Federal Transcript) TESTIFIES AS FOLLOWS:

DIRECT EXAMINATION BY MR. BRODGEN:

- Q. State your name?
- A. L. B. Faulkner, deputy sheriff of Vance County.
- Q. How long have you been deputy sheriff of Vance County?
- A. Eight years.
- Q. You have been assisting the sheriff in summoning jurors?
- A. Yes, sir.
- Q. In what manner did you go about summoning jurors?
- A. Regular jury we send a jury card.

- Q. Do you happen to have one of those with you?
- A. This is it. A double card. We fill it out and send it to each person. When they receive it they tear it half in two, sign it and send the half back addressed to the Sheriff.
- Q. About what percentage of the cards do you get back?
- A. Over ninety-nine percent.
- Q. If someone doesn't send a card back what do you do?
- A. Two or three days before court starts we check the list and see who has returned the card and who has not and then try to contact the ones who haven't.
- Q. Either by telephone or personal service?
- A. Yes, sir.
- Q. Have you received any instructions that negroes shall not be served?
- A. No, sir. We send cards to every name handed to us.
- Q. Have your yourself discriminated against negroes for serving?
- A. No, sir.
- Q. To your personal knowledge has any discrimination been practiced?
- A. No discrimination.
- Q. Do you have any personal knowledge of any dots being on the jury scroll?
- A. I didn't until Bertie County.
- Q. You don't know how they got on there?
- A. No, sir.
- Q. The Clerk gave you a list of the ones to be served for jury duty. You know whether there were any dots then?
- A. No, sir.
- Q. You know that any are negroes?
- A. Only way I find out I go to the tax book. In the tax book each name has a number opposite it which denotes the township and then I look in the tax book and find the address.
- Q. You send them out regardless of white or negro?
- A. Doesn't make any difference.



- Q. Do you turn in the list of those who were not summoned?
- A. Yes, sir.
- Q. To whom does that go?
- A. Most of the time we have two lists. The Sheriff keeps one and the other goes into the auditor's office.
- Q. When a person is not summoned what sort of record is made on the clerk of the superior court's record?
- A. Not served.
- Q. How is that indicated?
- A. When court convenes the court calls for the list. The sheriff is there with his list and if the sheriff has not called them we say in open court "Not served".
- Q. Do you make a notation on your list?
- A. "Not served".
- Q. You put that opposite each name?
- A. If he is served I mark a cross or an "X", and the ones that haven't been served I put on "Not served".
- Q. Have you been present at most terms of court?
- A. All except one in the eight years I have been there.
- Q. Have you noticed any negroes on the petit jury since 1949?
- A. They have been drawn from every jury since then.
- Q. Notice any members of the negro race on the grand juries?
- A. Two or three. E. A. Bullock and Thad Jackson served on one and it seems to me William Crews served on one.
- Q. Approximately how many negroes on each petit jury?
- A. From one to five.
- Q. What has been the average number for each term of court?
- A. I would say three or four.
- Q. How many are on your present or January term of court, petit jury, how many negroes on that?
- A. I think five or six names drawn. One was Hawkins who was sick and one more came back "dead".

[fol. 205] UNITED STATES COURT OF APPEALS FOR THE FOURTH  
CIRCUIT

No. 6331

RALEIGH SPELLER, Appellant,

versus

ROBERT A. ALLEN, Warden, Central Prison of the State of  
North Carolina, Raleigh, North Carolina, Appellee

No. 6332

CLYDE BROWN, Appellant,

versus

ROBERT A. ALLEN, Warden, Central Prison of the State of  
North Carolina, Raleigh, North Carolina, Appellee

Appeals from the United States District Court for the  
Eastern District of North Carolina, at Raleigh

OPINION—Filed November 5, 1951

(Argued October 12, 1951. Decided November 5, 1951)

[fol. 206] Before Parker, Soper and Dobie, Circuit Judges

Herman L. Taylor (C. J. Gates on brief) for Appellant  
in No. 6331; Hosea V. Price (Herman L. Taylor on brief)  
for Appellant in No. 6332; E. O. Brogden, Jr., Attorney for  
State Highway and Public Works Commission of North  
Carolina, for Appellee in No. 6331; R. Brookes Peters, Jr.,  
General Counsel of State Highway & Public Works Com-  
mission of North Carolina, for Appellee in No. 6332; (Harry  
McMullan, Attorney General of North Carolina, on briefs  
for Appellee in Nos. 6331 and 6332).

PER CURIAM:

These are appeals from denials of writs of habeas corpus  
in cases in which appellants have been convicted of capital  
felonies and sentenced to death by North Carolina state

courts. In both cases the questions raised in the petitions for habeas corpus had been raised and passed upon by the trial court, the action of the trial court had been affirmed by the Supreme Court of the state and the Supreme Court of the United States had denied certiorari.\* *State v. Speller* 231 N. C. 549, 57 S. E. 2d 759, cert. denied *Speller v. North Carolina* 340 U. S. 835; *State v. Brown* 233 N. C. 202, 63 S. E. 2d 99, cert. denied *Brown v. Carolina* 341 U. S. 943. In the *Speller* case the court below, after granting the writ [fol. 207] of habeas corpus and hearing evidence on the question presented and deciding that appellant's position was without merit, vacated the writ and dismissed the petition on the ground that upon the procedural history of the case the appellant was not entitled to the writ. In the *Brown* case the petition for the writ was denied without hearing, on the basis of its procedural history. We think that dismissal in both cases was clearly right. In view of the action of the state Supreme Court upon the identical questions presented to the court below and the denial of certiorari by the Supreme Court of the United States, the cases fall squarely within the rule that "a federal court will not ordinarily re-examine upon a writ of habeas corpus the questions thus adjudicated." *Ex Parte Hawke* 321 U. S. 114, 64 S. Ct. 448, 450, 88 L. Ed. 572; *Darr v. Burford* 339 U. S. 200, 70 S. Ct. 587, 94 L. Ed. 761; *Adkins v. Smyth* 4 Cir. 188 F. 2d 452; *Goodwin v. Smyth* 4 Cir. 181 F. 2d 498; *Stonebreaker v. Smyth* 4 Cir. 163 F. 2d 498, 499. As said by this court in the case last cited:

"We are confronted at the outset with the fact that the case presented by petitioner is precisely the same as that in which relief was denied by the Virginia courts and in which certiorari was denied by the Supreme Court of the United States. The rights of petitioner were fully presented in that case and the Virginia courts had full power to grant the relief asked, had

\* Two prior convictions of *Speller* on the same charge had been reversed by the North Carolina Supreme Court because of discrimination against Negroes in the selection of juries. *State v. Speller* 229 N. C. 67, 47 S. E. 2d 537; *State v. Speller* 230 N. C. 345 53 S. E. 2d 294.

they thought petitioner entitled to it. The facts were fully before the Supreme Court of the United States on certiorari; and proper respect for that court compels the conclusion that if it had thought that the record showed a denial of petitioner's constitutional rights, certiorari would have been granted and petitioner would have been afforded relief. While action of the Virginia courts and the denial of certiorari by the Supreme Court were not binding on the principle [fol. 208] of *res judicata*, they were matters entitled to respectful consideration by the court below; and in the absence of some most unusual situation, they were sufficient reason for that court to deny a further writ of habeas corpus. It would be intolerable that a federal district court should release a prisoner on habeas corpus after the state courts have refused him relief in precisely the same case on a similar writ and the United States Supreme Court has refused to review their action on certiorari. This would be, in effect, to permit a federal district court to review the Supreme Court of the United States as well as the highest court of the state. The rule in such cases was stated in the case of *White v. Ragen* 324 U. S. 760, 764, 765, 65 S. Ct. 978, 981, 89 L. Ed. 1348, relied on by the court below, as follows: "If this Court denies certiorari after a state court decision on the merits, or if it reviews the case on the merits, a federal District Court will not usually re-examine on habeas corpus the questions thus adjudicated. *Ex parte Hawk*, *supra*, 321 U. S. 114, 118, 64 S. Ct. 448, 88 L. Ed. 572."

"The citation of *Ex parte Hawk* shows what the court had in mind in the use of the words 'will not usually re-examine' in the statement just quoted; for the court had pointed out in that case the sort of cases in which the district court would be justified in granting habeas corpus notwithstanding the denial of certiorari in cases where the state court had refused to grant relief. These were cases where resort to state court remedies had failed to afford a full and fair adjudication of the federal contentions raised either because the state afforded no remedy or because the



remedy afforded proved in practice unavailable or seriously inadequate."

Affirmed.

[fols. 209-210] UNITED STATES COURT OF APPEALS FOR THE  
FOURTH CIRCUIT

No. 6331

RALEIGH SPELLER, Appellant,

vs.

ROBERT A. ALLEN, Warden, Central Prison of the State of  
North Carolina, Raleigh, North Carolina, Appellee

JUDGMENT—Filed and Entered November 5, 1951

Appeal from the United States District Court for the  
Eastern District of North Carolina.

This Cause came on to be heard on the record from the  
United States District Court for the Eastern District of  
North Carolina, and was argued by counsel.

On consideration whereof, it is now here ordered and  
adjudged by this Court that the order of the said District  
Court appealed from, in this cause, be, and the same is  
hereby, affirmed with costs.

November 5th, 1951.

John J. Parker, Chief Judge, Fourth Circuit.

[fol. 211] Clerk's Certificate to foregoing transcript omit-  
ted in printing.

[fol. 212] SUPREME COURT OF THE UNITED STATES, OCTOBER  
TERM, 1951

[Title omitted]

ORDER ALLOWING CERTIORARI—March 10, 1952

On petition for writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 643 and placed on the summary docket.

It is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 213] SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 643

[Title omitted]

STIPULATION—April 12, 1952

It is stipulated by and between Counsel for Petitioner and Counsel for Respondent that the portion of the record in the appeal of the above entitled matter to be printed for the hearing of this case on the merits shall consist of the following:

From Volume I of the Record in United States Court of Appeals for the Fourth Circuit

- |   |           |
|---|-----------|
| I. Petition to District Court for Writ of Habeas Corpus | pp. 6-18  |
| II. Answer to Petition for Writ of Habeas Corpus        | pp. 21-28 |

- III. Return to Writ of Habeas Corpus in District Court and the following Exhibit which by Reference is made a part of the Return: pp. 34-35
- EXHIBIT NO. I. Certified Copy of Judgment of Death in State Trial Court p. 36
- IV. Respondent's Motion to Dismiss Petition for Writ of Habeas Corpus before District Court pp. 37-39
- V. Transcript of Evidence in District Court in its Entirety, including Index Thereof p. 92

From Volume II of the Record in the United States Court of Appeals for the Fourth Circuit

- VI. Findings of Fact and Conclusions of Law of District Court pp. 79-82
- VII. Memorandum Opinion of District Court pp. 67-77
- VIII. Order of District Court Denying Petition for Writ p. 83

[fol. 214] From Brief of Respondent-Appellee and Appendix, United States Court of Appeals for the Fourth Circuit, No. 6331.

- X. Appendix to Respondent-Appellee's Brief in its entirety pp. 32-70

This the 12th day of April, 1952.

Herman L. Taylor, Counsel for Petitioner. Harry McMullan, Attorney General of North Carolina; Ralph Moody, Assistant Attorney General; R. Brookes Peters, Jr., General Counsel of State Highway & Public Works Commission, Counsel for Robert A. Allen, Respondent.





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# TRANSCRIPT OF RECORD

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Supreme Court of the United States

OCTOBER TERM, 1952

20  
No. 620

BENNIE DANIELS AND LLOYD RAY DANIELS,  
PETITIONERS.

vs..

ROBERT A. ALLEN, WARDEN, CENTRAL PRISON  
OF THE STATE OF NORTH CAROLINA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

---

PETITION FOR CERTIORARI FILED DECEMBER 27, 1951

CERTIORARI GRANTED MARCH 3, 1952.

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 626

BENNIE DANIELS AND LLOYD RAY DANIELS,  
PETITIONERS,

vs.

ROBERT A. ALLEN, WARDEN, CENTRAL PRISON  
OF THE STATE OF NORTH CAROLINA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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**IN UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF NORTH CAROLINA**

No. 449B

BENNIE DANIELS and LLOYD RAY DANIELS, Petitioners,

vs.

J. P. CRAWFORD, Warden, Central Prison of the State of  
North Carolina, Raleigh, North Carolina, Respondent

PETITION FOR WRIT OF HABEAS CORPUS—Filed August 29,  
1951

To the District Court of the United States for the Eastern  
District of North Carolina:

The petition of Bennie Daniels and Lloyd Ray Daniels,  
respectfully shows:

1. That they are citizens of the United States of America and the State of North Carolina, and members of the Negro or colored race.
2. That they are at the present time unjustly and unlawfully detained and imprisoned at the Central Prison of the State of North Carolina, Raleigh, North Carolina, by the respondent, J. P. Crawford, Warden of said prison, by virtue of a judgment and sentence of death by asphyxiation pronounced upon them by the Superior Court, Pitt County, North Carolina, on June 6, 1949, upon conviction for the [fol. 7] crime of murder in the first degree.

Petitioners aver that they are not guilty of the offense for which they were tried, convicted and are presently detained by the respondent in the death house of the Central Prison of the State of North Carolina awaiting the execution of sentence of death by asphyxiation on June 9, 1950 and that the said imprisonment, restraint and sentence are illegal and void in that during the trial of petitioners before the Superior Court of Pitt County the petitioners were deprived of life and liberty without due process of law and without being afforded the equal protection of the laws all in



violation of the Fourteenth Amendment to the United States Constitution.

In order that this Court may fully appreciate the grounds for the instant petition, petitioners set forth herein the circumstances leading up to the instant petition and then, in detail, petitioners will set forth the specific respects in which it is alleged that petitioners' rights under the Fourteenth Amendment have been so violated as to render the judgment and sentence of conviction null and void.

William Benjamin O'Neal, a taxicab driver, was brutally murdered some time late Saturday night, February 5th, 1949. His body was found in a horribly mutilated condition, due to many knife wounds and heavy blows several feet from his taxicab. The scene of the crime was near a tobacco barn on a dark, deserted road several miles from Greenville, Pitt County. The body of O'Neal, a white man, [fol. 8] was first found before noon of February 6th. Between 1:00 and 1:30 A. M. of February 7th, the petitioner Lloyd Ray Daniels, a 17 year old illiterate Negro, was arrested by six white police officers and then in the company of three of those officers he was taken to and placed in a jail cell in Williamston, Martin County, 30 miles from Greenville. At some time between 5 and 6 A. M. on the morning of February 8th, the petitioner Bennie Daniels, also a teen-age illiterate Negro, was arrested by four white men and taken by them to the same jail. An indictment charging petitioners with the wilful and premeditated murder of William Benjamin O'Neal was returned by the March Term, 1949, of the Grand Jury of Pitt County comprised of 18 persons, none of whom were Negroes.

At the time petitioners were arraigned after indictment before the Superior Court of Pitt County counsel was appointed for them. Petitioners pleaded to the charge but their trial was continued to the next succeeding Term as the defendants were committed to the State Hospital for Insane Negro persons for the purpose of examining into their mental condition. Thereafter petitioners obtained their own counsel to replace Court-appointed counsel and on March 24, 1949, the Superintendent of the aforesaid Hospital reported that petitioners had sufficient intelligence to distinguish right from wrong.

On the calling of the case for trial at the May 30th Term, 1949, of the Superior Court of Pitt County, the petitioners moved to quash the indictment and challenge to the array [fol. 9] of Petit Jurors on the grounds that Negroes had been systematically and arbitrarily excluded from the Grand and Petit Juries of Pitt County, solely for reasons of race or color thereby depriving petitioners of the equal protection of the laws guaranteed to them by the Fourteenth Amendment of the United States Constitution. A hearing was held before the Honorable Clawson L. Williams, Judge Presiding, prior to the selection of the Petit Jury, upon the aforesaid motion and evidence was presented by petitioners and by the State. At the conclusion of the hearing the motion to quash the indictment and the challenge to the array were both denied. Thereafter a Petit Jury was impanelled, which Jury included one Negro.

At the trial the State offered in evidence alleged oral and signed confessions by petitioners that they had murdered O'Neal. Upon timely objection by counsel for petitioners, the Trial Judge held a hearing without the presence of the Petit Jury on the question of the admissibility of the alleged confessions and determined them to be voluntary and, therefore, competent and admissible. The State introduced in evidence the alleged confessions of the petitioners and other evidence intended to corroborate the charge of murder. Petitioners testified on their own behalf and denied guilt of the crime as charged, denied ever having signed the alleged confessions, asserted that the self incriminating statements which they may have made orally were induced by force and fear, and offered in evidence testimony tending to establish their innocence of the crime. At the conclusion of the trial motions to dismiss were denied [fol. 10] and the case submitted to the Jury upon a lengthy set of instructions which took from the Jury the question whether the alleged confessions were voluntary. The Jury found the petitioners guilty of murder in the first degree as charged, without recommendation of mercy, and sentence of death was imposed on the 6th day of June, 1949.

Upon the pronouncement of judgment counsel for petitioners in open court orally served notice of appeal. The Judge Presiding thereupon allowed petitioners sixty days

from the date of judgment in which to make and serve a statement of the case on appeal in accordance with the local practice; the State was allowed forty-five days thereafter to prepare and serve amendments to the petitioners' statement or a counter-statement. The transcript of the record made in the Trial Court, which transcript is presented herewith to this Court and is made a part hereof, comprises 4 volumes, totalling 704 typewritten pages. Counsel for petitioners received the transcript from the Court Reporter on or about forty-five to fifty days after June 6th. Thereafter counsel for petitioners prepared a statement of the case on appeal and served the same upon the Solicitor of Pitt County on August 6, 1949. Within forty-five days thereafter, the Solicitor served and filed 132 exceptions to the case on appeal and, in addition, moved to strike the case on appeal on the grounds that the last day for petitioners [fol. 11] to serve such statement upon the Solicitor was August 5th, one day prior to the date of service. A hearing on the motion was held on September 29, 1949, before Williams, J., and at the conclusion thereof the motion of the Solicitor to strike petitioners' case on appeal was granted, and an order entered thereon on the grounds that the statement had been served one day late. The effect of the order striking the statement of the case on appeal was to preclude an appeal on the merits to the North Carolina Supreme Court.

On September 27, 1949, prior to the order of Williams, J., petitioners filed with the Supreme Court of North Carolina a petition for writ of certiorari for the purpose of extending the time within which to docket their appeal in the said Supreme Court; and subsequent to the order of September 29 of Williams, J., a supplemental petition for a writ of certiorari was filed in the said Supreme Court which recited the order of Williams, J., and prayed the North Carolina Supreme Court for leave to bring the cause before the said Court.

In a decision dated November 2, 1949 (*State v. Daniels*, 231 N. C. 17, 56 S. E. 2d 2) the petition for certiorari was denied. In the opinion by Seawell, J., for the North Carolina Supreme Court, the reasons assigned by counsel for petitioners for the one day delay were noted, considered, and rejected, and the petition for certiorari was denied.

without examination of the errors assigned. The Court indicated, however, that serious Federal questions were [fol. 12] present. The objections made to the exclusion of Negroes from the Grand and Petit Juries, and to the admission in evidence of the alleged confessions were noted and the Court then wrote as follows:

" . . . Both these objections involve questions of invasion of constitutional rights which, in the instant case, can be presented only through matter extraneous to the record. Ordinarily in this situation resort may be had to writs of error *coram nobis*."

"Since here the authority for the writ stems from the supervisory power given the Supreme Court in the section of the Constitution cited, it is necessary that an application be made to this Court for permission to apply for the writ to the Superior Court in which the case was tried. In *re Taylor*, *supra*, 230 N. C. 566, 569, 53 S. E. 2d 857, 859. It is granted here only upon a 'prima facie showing of substantiality,' and it is observed in the *Taylor* case last cited, 'The ultimate merits of the petitioner's claim are not for us, but for the trial court.'"

"On consideration in the trial court, if the decision is adverse to the petitioners, the Court will find the facts, and an appeal to this Court will lie as in other cases'."

Subsequently, in accordance with the foregoing suggestion, upon notice to the Attorney General of North Carolina and the Solicitor of Pitt County, petitioners filed a petition with the Supreme Court of North Carolina for permission to file a petition for writ of error *coram nobis* in Superior Court of Pitt County. That petition set forth the errors of law and fact committed by the Trial Court and designated the Federal questions presented.

[fol. 13] The latter petition was denied in a *per curiam* opinion (*State v. Daniels*, 231 N. C. 241, 56 S. E. 2d 546); dated December 14th, 1949, which described briefly the proceedings and then held:

"Their petition does not make *prima facie* showing of substance which is necessary to bring themselves within the purview of the writ. Citations, *supra*.



"The petition is insufficient to justify the Court in issuing the writ and instigating procedure in the court below.. State v. Daniels, *supra*; In re Taylor, (229 N. C. *supra*)."

Thereafter the Attorney General of North Carolina moved that the case and record be docketed and the appeal dismissed. Upon said motion the North Carolina Supreme Court held (*State v. Daniels*, 231 N. C. 509, 57 S. E. 2d 653):

"We have carefully examined the record filed in this case and find no error therein. For the causes stated the motion of the Attorney General is allowed; the judgment of the lower court is affirmed, and the appeal is dismissed."

On January 31, 1950, Mr. Chief Justice Vinson of the United States Supreme Court signed an order, upon motion of petitioners, extending their time to file with that Court a petition for a writ of certiorari to March 14, 1950; by order dated March 2, 1950, Chief Justice Stacey of the North Carolina Supreme Court stayed the sentence of death [fol. 14] pending the disposition of the petition to the United States Supreme Court.

In its brief upon the aforesaid petition, the State of North Carolina asserted the following:

"Since the Supreme Court of North Carolina merely held that the petition was insufficient, there is no reason why the Petitioners cannot now avail themselves of this remedy [petition to the North Carolina Superior Court for writ of error *coram nobis*] if they will file a proper and sufficient petition before the Supreme Court of North Carolina. The Respondent, therefore, contends that the Petitioners have never exhausted their remedies afforded by the Supreme Court of North Carolina for a review of this question. The Supreme Court of North Carolina has, therefore, not passed upon the constitutional issues now raised by the Petitioners." *Daniels, et ano. v. State of North Carolina*, United States Supreme Court, October Term, 1949, No. 412, Misc., Respondent's Brief, p. 28.

On May 8, 1950, the United States Supreme Court denied the aforesaid petition for a writ of certiorari without opinion.

Petitioners thereupon submitted another petition to the Supreme Court of North Carolina for a writ of error *coram nobis* in order to obtain a review, for the first time, upon the merits of the constitutional issues raised. But the said petition was denied by a decision of the North Carolina Supreme Court dated May 24, 1950, wherein the North Carolina Supreme Court indicated that it considered that the second petition for a writ of error *coram nobis* presented no new facts and that said petition was therefore insufficient.

[fol. 15] Petitioners are informed by their counsel and believe that under the law of the State of North Carolina the date of execution is automatically fixed for the third Friday succeeding the aforesaid decision by the Supreme Court of North Carolina and that therefore the date for the execution of the sentence of death is presently fixed for June 9, 1950. Petitioners are informed by their counsel, Herman L. Taylor, Esq., that in a conversation between said attorney and Devins, J., of the North Carolina Supreme Court, that upon the filing and issuance of the instant writ a stay of execution will be granted by said North Carolina Supreme Court. Petitioners at this time, however, call to the attention of this Court that they are presently under sentence of death *although petitioners have never had the benefit of a review of the serious Federal questions presented by their convictions.*

Petitioners now turn to the respects in which they claim that the judgments and sentences of conviction are illegal, null and void.

A. The convictions of petitioners deprive them of their rights and their liberty without due process of law because of the admission into evidence of their alleged confessions; the convictions of petitioners are therefore null and void, and their imprisonment and restraint by respondent illegal.

The murder of William Benjamin O'Neal for which petitioners were indicted and convicted occurred late in the [fol. 16] night of Saturday, February 5, 1949. Sheriff Tyson of Pitt County, where the crime was committed, tes-

tified that the police had received an undisclosed tip which led them to search out the petitioners. On the morning of Sunday, February 6th, several officers went to the home of the petitioner Lloyd Daniels and there questioned his mother as to his whereabouts. On the Saturday night of the murder, the petitioner Bennie had slept at the home of his cousin, the petitioner Lloyd, and then Sunday afternoon petitioners went into the City of Greenville. There petitioners went to a movie theatre and then to the home of the petitioner Lloyd's sister. When questioned, the petitioner Lloyd's mother had notified the police that the petitioner Lloyd had gone to see his sister. At the home of the petitioner Lloyd's sister, petitioners Lloyd and Bennie learned that men bent on violence were looking for them in connection with the murder of O'Neal. Petitioners went down to the railroad tracks together, anxious and concerned about the threat of which they had heard and while the petitioner Bennie decided to remain in the nearby woods for a while, the petitioner Lloyd went back into town and took a bus to the home of his girl friend. He arrived there 6:30 P. M. on the Sunday of February 6th. It was at this home that the petitioner Lloyd was arrested by six white officers of whom at least three were armed.

The petitioner Lloyd's arrest was made sometime between 1:00 A. M. and 1:30 A. M., February 7th. The arrest of petitioner Lloyd was made without a warrant. The petitioner Lloyd was handcuffed and he and the officers walked about a mile through the night to where the police car was parked. The petitioner Lloyd was not warned that whatever he would say might be used against him; nor was he told where he was being taken; and he was not told of his right to stand mute or of his right to the advice of friends or counsel, although petitioners are informed that §§ 15-47 of c. 15, Art. 6, of the General Statutes of North Carolina provides:

"Upon the arrest, detention, or deprivation of the liberties of any person by an officer in this state, with or without warrant, it shall be the duty of the officer making the arrest to immediately inform the person arrested of the charge against him . . . ; and it shall be the duty of the officer making the arrest to permit

the person so arrested to communicate with counsel and friends immediately, and the right of such persons to communicate with counsel and friends shall not be denied."

Upon reaching the police car after his arrest, the petitioner Lloyd was placed in the back seat with Officer Gibbs and in the front seat were Officer Manning and Sheriff Tyson. The petitioner Lloyd remained handcuffed; each of these police officers was armed. After traveling for a few minutes, the police car "broke down" in a dark, deserted area and remained there for about 30 minutes. Tyson and Manning went out to "inspect" the car and left Gibbs alone with Lloyd in the back seat. As petitioner Lloyd testified upon the trial:

"When they got me they didn't tell me nothing. Not with that many they didn't tell me nothing and he told [fol. 18] me to come on and get my hat. I went and got my hat and they pushed me out the door. I went out and asked them what they got me for and they said I would find out sooner or later and I said 'I didn't do nothing but have a fight in Bonner Lane' and Mr. Gibbs said 'You are a lie, you did' and I told him 'No sir, I didn't' and he kept right on cursing and pushing me right on in front of the car. I went on and got in the car and the rest of the officers went to the other car and talked—they didn't get in the car with us then. He asked me didn't I kill this guy. I said 'no' and he said 'You are lying' and he put his hand on his pistol. He said 'You did kill him'—I said 'I didn't kill him'—and he said 'You will find out', and the rest of the officers . . . came and got in the car and we started to Wilson . . . 'After we started off in the car he asked did I kill this guy and I said 'No, I don't know anything about it'; he put his hand on his pistol and I asked him what was he going to do, kill me. He said he was going to kill me if I didn't tell him the truth and I told him I didn't know nothing to tell him. He stopped on the road just before we got on the highway and said 'Didn't you kill this guy?' and he said 'If you don't tell me you are not going to see your mother



again' and he got mad and went to cursing and I told him".

Subsequently, the petitioner Lloyd was brought to the jail at Williamston and there put in a cell. (It should be noted that while the murder was committed a few miles from Greenville and petitioners lived in and were tried in Pitt County, when arrested, however, petitioners were taken to Williamston, in Martin County, approximately 30 miles from Greenville.)

Even after he was thus arrested, the petitioner Lloyd was still not arraigned or brought before a magistrate although he is informed by his counsel that it is provided as follows by General Statutes of North Carolina, c. 15, Art. 6, §§ 15-46:

[fol. 19] "Every person arrested without warrant shall be either immediately taken before some magistrate having jurisdiction to issue a warrant in the case, or else committed to the county prison, and, as soon as may be, taken before such magistrate, who, on proper proof, shall issue a warrant and thereon proceed to act as may be required by law."

The petitioner Bennie remained in the woods until late Sunday night, February 6th, when he went to the home of his cousin and then went to his own home. There he told his mother of the threats against his life that he had heard of in Greenville. Fearful that police or a mob in search for the petitioner Bennie might also lynch her and the members of her family, the petitioner Bennie's mother told him to go to the farm of one Moore. It was there that the petitioner Bennie was picked up at about 5:00 A. M. on Tuesday morning, February 8, 1950.

The petitioner Bennie was arrested by four white men, including at least one armed officer. He was handcuffed and taken from one car to a second car. As in the case of the petitioner Lloyd, the petitioner Bennie, too, was taken to the jail in Williamston out of Pitt County without being told where he was being taken; he was not told of his right to stand mute and was not told of his right to the advice of friends and counsel guaranteed to him under

the laws of North Carolina. And also, as in the case of the petitioner Lloyd, the petitioner Bennie was not brought before a Magistrate or other hearing officer after his arrest. Instead, he was put in a jail cell in a county out of [fol. 20] Pitt County and without any notification to his friends or family.

Sometime in the late afternoon of February 8th, the petitioner Lloyd was brought down to the office of Sheriff Roebuck and the petitioner Bennie was brought into a separate room in that office. The petitioner Bennie had been questioned, threatened and beaten in his cell before being brought down to the office. Petitioners were then questioned separately for a period of at least an hour or an hour and a half, with at least six or seven white men present. The police officers testified at the trial that at the end of that time, and sometime between 6:00 and 7:00 P. M. on February 8th, full confessions had been obtained from each of the petitioners, that the two were confronted with each other at that time and each of the confessions read to both of them, that the confessions were acknowledged by the petitioners to be true statements, and that the petitioner Lloyd then made his mark on his statement and the petitioner Bennie signed his. The petitioners testified to the contrary and the fact is that they never acknowledged that they had committed the murder of O'Neal and that they never signed or made their mark on the alleged confessions. The language employed in the alleged confessions is language alien to the vocabulary, the grammatical faculties and the mentality of petitioners who, prior to the trial, had been committed to a state institution for examination to determine their mental competency.

It was never, at any time, disputed by the State of North [fol. 21] Carolina that prior to the alleged confessions neither the petitioner Lloyd nor the petitioner Bennie had had the benefit, advice of or contact with friends, family, or counsel; nor is it disputed that 10 to 15 minutes after the confessions were allegedly signed, the petitioners were taken from the jail in Williamston to Raleigh, 125 miles from Williamston and almost 100 miles from Greenville.

Petitioners are informed by their counsel and believe that the alleged confessions obtained in the manner described

violate the constitutional standards as defined by the United States Supreme Court in *Ward v. Texas*, 316 U. S. 547, 555:

"This Court has set aside convictions based upon confessions extorted from ignorant persons who have been subjected to persistent and protracted questioning, or who have been threatened with mob violence, or who have been unlawfully held incommunicado without advice of friends or counsel, or who have been taken at night to lonely and isolated places for questioning. Any one of these grounds would be sufficient cause for reversal."

The petitioners are Negroes of a southern community. The petitioner Lloyd was 17 years of age when he was arrested and the petitioner Bennie was 16 years. The petitioner Lloyd is one of fifteen children; he has never had any schooling in his life, his only occupation has been that of farming, and he can neither read nor write. The petitioner Bennie has had two years of schooling but can not read or write except to write his own name; he, too, had never engaged in any occupation more sophisticated than [fol. 22] that of farming. The crime for which petitioners were arrested was the murder of a white man and that murder was committed in an extraordinarily brutal fashion. O'Neal had been stabbed, cut and bludgeoned to death, so that his features were practically beyond recognition. Such a crime is well calculated to inflame the passions of even a conservative community. The petitioners were warned, before their arrest, that the murder had been committed and that they were being sought for that murder. It was reported to petitioners that "this man was killed out in the country and they said wherever they found you that's where they are going to leave you". Both petitioners were arrested in the middle of the night by numerous white police officers, who were armed, and then petitioners were handcuffed. Both petitioners were walked a considerable distance in the dark and then driven for a considerable distance in the dark. In the instance of the petitioner Lloyd, the ride also included a delay of about 20 minutes on a desolate road. Both were driven to a jail in a different county and

community from their own without notice thereof to friends or family. In neither instance did the police obtain a warrant of arrest and in both instances the petitioners were unlawfully detained without being arraigned and without a hearing until sometime after their alleged confessions were reduced to writing. In the case of the petitioner Lloyd, he was thus unlawfully detained for about 42 hours before his final alleged confession was reduced to writing; the petitioner Bennie was thus held without a hearing for about 14 hours. The alleged confessions of petitioners were made [fol. 23] without their having had the benefit of the advice of friends, relatives or counsel and without being informed of their right to such assistance, and those confessions came at the end of persistent questioning in the presence of six or seven white police officers and a stenographer who was there present waiting to prepare their written confessions. Ten or fifteen minutes after the confessions were allegedly signed, the petitioners were taken to the jail house in another county, still more distant from their homes, friends and families.

Petitioners are informed by their counsel and believe that the foregoing facts—which have not been disputed by the State of North Carolina to date—constitute the inherently coercive circumstances which, under the decisions of the United States Supreme Court, render any resulting confession invalid and inadmissible. The youthful age of the petitioners (*Chambers v. Florida*, 309 U. S. 227; *Haley v. Ohio*, 332 U. S. 596); their illiteracy (*Harris v. South Carolina*, 338 U. S. 68; *White v. Texas*, 309 U. S. 63); the brutality of the crime and the threats of mob violence (*Chambers v. Florida*, *supra*; *Ward v. Texas*, *supra*); the circumstances of their arrest and being taken to a jail in a different county (*Ward v. Texas*, *supra*); their detention without hearing or arraignment (*Harris v. South Carolina*, *supra*; *Turner v. Pennsylvania*, 338 U. S. 62; *Watts v. Indiana*, 338 U. S. 49; *Haley v. Ohio*, *supra*) and without any communication with family, friends or counsel (*Harris v. South Carolina*, *supra*; *Ashcraft v. Tennessee*, 332 U. S. 143; *White v. Texas*, *supra*; *Chambers v. Florida*, *supra*); [fol. 24] and the harrowing questioning which led up to the alleged confessions all combine to make those documents tainted and constitutionally inadmissible.



Petitioners are informed and believe that, in view of the facts set forth concerning their alleged confessions, their convictions are null and void, and their restraint by respondent illegal so that they are entitled to the writ of habeas corpus here prayed for under Section 2241(c) (3) of Title 28 of the United States Code.

B. Petitioners have been deprived of the equal protection of the laws by the discriminatory and arbitrary exclusion of Negroes from Grand and/or Pettit Juries in Pitt County, solely for reasons of race, including the Grand Jury which indicted and the Pettit Jury which convicted petitioners. The convictions of petitioners are therefore null and void, and the imprisonment and restraint of petitioners by respondent illegal.

According to the United States census for 1940 the population of Pitt County consisted of 32,151 white persons and 29,086 Negroes. Of this total population, 17,323 white persons and 13,762 Negroes were above the age of 21. Negroes thus constitute 47.5% of the total population and about 44% of persons above 21 in Pitt County according to the 1940 census.

Prior to 1947 no Negro had served on the Grand Jury in the Superior Court of Pitt County in at least more than twenty years. And prior to 1947, only in a very few and [fol. 25] desultory instances were Negroes called, summoned and served on Petit Juries.

In 1947 the jury boxes of Pitt County Superior Court were purged, and all names of Jurors therein removed therefrom, and the scrolls containing the names destroyed, and the Board of Commissioners proceeded to prepare a new jury list. The tax list of the County and the voting registration lists of the County were used to compile the jury list. Each Commissioner was then obliged to select from his list persons whom he knew to possess the moral character and intelligence to serve as jurors. Each Commissioner was a white man and was assisted by another white man familiar with the residents of the various districts. Thereafter each Commissioner submitted his selections to the entire Board for approval. From the jury lists thus prepared the Sheriff summoned the persons whom he could find to serve as jurors. The names of the jurors summoned

were placed on slips of paper, thrown into a hat, and Grand and Petit Jurors were picked according to the slips picked at random out of the hat by a child of less than 10 years of age.

While the number of Negroes in the total population and the population of persons over 21 was approximately 44%, the 1946 tax list (which contained a separate list for Negro tax-payers) included 5,173 Negro tax-payers of a total of 15,517 tax-payers so that about 33 $\frac{1}{3}$ % of the names on the tax list were Negroes. And the registration list of 1946 [fol. 26] used by the Commissioners contained the names of 423 Negroes from among a total of 20,488 registrants—2% of the persons on this list were Negroes. Despite the foregoing percentage of Negroes eligible for Petit and Grand Jury duty, *even after 1947 no Negro was chosen or served on a Grand Jury*. And while Negroes appeared on Petit Juries after 1947, those appearances were infrequent and desultory; the number of Negroes who served on Petit Juries was less than 5%—a minute figure in comparison with the total number of eligible Negroes in the community.

Petitioners are informed by their counsel and believe that in view of the percentage of Negroes eligible for jury duty in Pitt County, the total exclusion of Negroes from Grand Juries and the infinitesimal number of Negroes on Petit Juries in Pitt County amounts to discrimination against Negroes on those juries and that the indictment and conviction of petitioners by juries wherein Negroes were thus excluded for reasons of race deprived petitioners of the equal protection of the laws under the decisions of the United States Supreme Court. *Strader v. West Virginia*, 100 U. S. 303; *Neal v. Delaware*, 103 U. S. 370; *Bush v. Kentucky*, 107 U. S. 110; *Norris v. Alabama*, 294 U. S. 587; *Hale v. Kentucky*, 303 U. S. 613; *Pierre v. Louisiana*, 306 U. S. 354; *Smith v. Texas*, 311 U. S. 128; *Hill v. Texas*, 316 U. S. 400; *Patton v. Mississippi*, 332 U. S. 463; *Brunson, et al. v. North Carolina*, 333 U. S. 851.

Petitioners are informed by their counsel and believe that the decision of the United States Supreme Court in *Cassell* [fol. 27] *v. Texas* decided on April 24, 1950, a date after the trial of petitioners, requires that the petition prayed for herein be granted. For according to petitioners' counsel

the United States Supreme Court there held that: (1) the consistent limitation of the number of Negroes selected for jury service, even though that number is not disproportionate to the number of Negroes eligible for jury service, "would violate our Constitution"; and (2) the selection of jury lists by white jury commissioners "only from those people with whom they are personally acquainted" resulting in the total absence of Negroes from the indicting Grand Jury constitutes discrimination. The evidence upon the trial of petitioners shows and petitioners allege herewith that the type of limitation of Negro jurors proscribed by the Supreme Court in *Casse v. Texas* has been practiced in Pitt County; and that in the selection of the jury lists for Pitt County the white jury commissioners and their assistants made their selection solely upon the basis of their personal acquaintance with the names presented to those commissioners.

Petitioners are informed and believe that in view of the facts set forth herein concerning the selection of jurors in Pitt County, their convictions are null and void, and that their imprisonment and restraint by respondent is illegal so that they are entitled to the writ of habeas corpus here prayed for in accordance with Section 2241 (c) (3) of Title 28 of the United States Code.

[fol. 28] C. The failure of the Trial Judge upon the trial of petitioners to leave to the jury the question whether the alleged confessions of petitioners were made freely and voluntarily was in violation of the Due Process Clause of the Fourteenth Amendment; the convictions of petitioners are therefore null and void, and the imprisonment and restraint of petitioners by respondent illegal.

At the conclusion of the trial the Trial Judge gave the Jury an instruction of unusual length, prolixity and complexity. In the course of that instruction he charged the Jury as follows:

"Ladies and Gentlemen of the Jury: With respect to the statements referred to in the alleged confessions there has been some argument about whether or not they were made freely and voluntarily. I instruct you that the circumstances and conditions under which the statements made were investigated by the Court under

preliminary examination of the Court as to whether they were made freely and voluntarily; it is determined by the Court that they were made freely and voluntarily and are competent to be admitted in evidence but you are the sole judges of the weight to be given them and the credit to be given them."

"And, with respect to whether the statements were made freely and voluntarily under the law it is the province of the Court to determine that, in order to determine whether or not they are admissible as evidence. The Court has decided that they were admissible as evidence because they were made without coercion or inducement, freely and voluntarily. But, you are not to infer from that that the Court has any intimation or wishes to be giving any intimation as to the weight you will give that evidence. That is solely a matter for you."

The aforesaid instruction plainly informed the Jury that it was not to consider whether the alleged confessions, which [fol. 29] alone could sustain the State's case, were made freely and voluntarily. The Jury was permitted to pass upon the weight to be assigned to those alleged confessions but that function was illusory at best for if the Jury was obliged to accept the confessions as having been made freely and voluntarily it could hardly fail to give these confessions conclusive weight. It is difficult to conceive of any evidence more damaging and more conclusive than a confession made freely and voluntarily.

The question whether the alleged confessions were made freely and voluntarily was a disputed material issue of fact upon the trial. It was, of course, a proper function of the Trial Judge to pass upon that question for the purpose of determining the admissibility of the alleged confessions. But the Trial Judge went further and took that question of voluntariness from the consideration of the Jury entirely as that question related to the innocence or guilt of the defendants, and, in effect, directed the verdict of the Jury on a material issue of fact in a criminal case.

Petitioners are informed and believe that the right to trial by jury in a capital cause is the kind of fundamental and



basic right which is guaranteed under the Due Process Clause of the Fourteenth Amendment to the United States Constitution as essential to "a fair and enlightened system of justice" (*Palko v. Connecticut*, 302 U. S. 319, 325.); and as an instruction which takes from a jury a material and disputed issue of fact is in violation of such a fundamental right to trial by jury (*Christoffel v. United States*, 338 U. S. [fol. 30] 84; *Fleischman v. United States*, 174 F. 2d 519; *Bryan v. United States*, 174 F. 2d 525; *Konda v. United States*, 166 F. 91, 93), the action of the Trial Judge was "such as to deprive petitioners of a trial according to the accepted course of legal proceedings" (*Buchalter v. New York*, 319 U. S. 427, 431) in violation of the Due Process Clause of the Fourteenth Amendment. In *Lyons v. Oklahoma*, 322 U. S. 596, 601, the United States Supreme Court stated that due process under the Fourteenth Amendment requires that the "instruction fairly raises the question of whether or not the challenged confession was voluntary". Under the test of the due process requirement as thus stated, the instruction of the Trial Judge constituted fundamental constitutional error.

Petitioners are informed and believe that, in view of the facts set forth as to the instruction to the Jury by the Trial Judge upon the trial of petitioners, their convictions are null and void, and their imprisonment and restraint by respondent illegal so that they are entitled to the writ of habeas corpus here prayed for in accordance with Section 2241 (c) (3) of Title 28 of the United States Code.

4. That as aforesaid the petitioners have exhausted all of their state remedies, including a petition for a writ of certiorari to the United States Supreme Court, and petitioners are, therefore, remediless save in this Court and by this procedure.

5. That no previous application has been made for the [fol. 31] writ below prayed.

Wherefore, the premises considered the petitioners pray:

(1) That a writ of habeas corpus directed to the said respondent, J. P. Crawford, may issue in their behalf so that petitioners may be brought forthwith before this Court;

(2) That said respondent be required to appear and answer the allegations of this petition;

(3) That following a full and complete hearing this Court relieve petitioners of said unlawful detention, imprisonment and sentence of death;

(4) That in the event that the Supreme Court of the State of North Carolina or any Justice thereof shall refuse to stay the execution of petitioners pending the determination of the instant petition before this Court that the respondent, J. P. Crawford, and his agents, officers and/or employees be stayed from executing the judgment and sentence imposed by the Superior Court of Pitt County, North Carolina, upon petitioners or from otherwise taking any action or proceedings against said petitioners pending the final determination of the instant petition;

(5) And for such other and further relief as to this Court [fols. 32-36] may seem just and proper under the circumstances.

Bennie Daniels. Lloyd Ray Daniels.

*Duly sworn to by Bennie Daniels and Lloyd Ray Daniels.  
Jurats omitted in printing.*

[fol. 37]

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT

ANSWER OF RESPONDENT, J. P. CRAWFORD, WARDEN OF THE  
CENTRAL PRISON OF THE STATE OF NORTH CAROLINA,  
RALEIGH, N. C.—Filed June 20, 1950

The Respondent, J. P. Crawford, Warden of the Central Prison of the State of North Carolina, Raleigh, N. C., answering the Petition for Writ of Habeas Corpus, filed herein by Petitioners Bennie Daniels and Lloyd Ray Daniels, for his answer, says:

1. The allegations of Paragraph 1 of the Petition are admitted.

2. Answering the allegations of Paragraph 2 of the Petition, the Respondent admits that the Petitioners are confined and in his custody in the Central Prison of the State of North Carolina, Raleigh, N. C., by virtue of a

commitment and judgment containing a sentence of death by asphyxiation pronounced upon Petitioners by the Superior Court of Pitt County, North Carolina, on June 6th, 1949, as a result of the conviction of the Petitioners of the crime of murder in the first degree; it is denied by Respondent that the Petitioners are unjustly and unlawfully detained and imprisoned; it is denied by Respondent that Negroes had been discriminatively, systematically and arbitrarily excluded from the Grand and Petit Juries of Pitt County; it is denied by Respondent that the confessions of Petitioners admitted in evidence in the trial of this cause in Pitt County were obtained from Petitioners, or either of them, by means of force, coercion, brutality, incessant questioning, or by any other means or methods that rendered said confessions invalid, illegal or unconstitutional, but to the contrary, the Respondent alleges that the Petitioners, and each of them, freely and voluntarily gave confessions showing that they were guilty of the murder [fol. 38] charged in the bill of indictment; the Respondent alleges that the admissibility of said confessions in evidence was passed upon according to the practice and procedure established by the State of North Carolina as controlling in its Courts, and the admission of said confessions in evidence and the ruling of the trial Court thereon cannot now be invalidated, set aside and subjected to collateral attack in a Habeas Corpus proceeding; that the Grand Jury that indicted Petitioners and the Petit Jury that tried Petitioners were both legally and constitutionally drawn, selected, organized and constituted under valid, legal and constitutional jury statutes, and the proceedings, administration and selection of said jurors by the jury officials cannot now be invalidated, set aside and subjected to collateral attack in Habeas Corpus proceedings, and especially since the Petitioners, acting through counsel of their own choice, neglected and refused to properly exercise their rights and remedy of appeal to the Supreme Court of North Carolina according to valid and constitutional rules and laws established by the State of North Carolina for the review of such questions upon appeal; it is admitted by Respondent that Petitioners' statement of case on appeal was stricken out by an order entered by Williams, J., on or about Sep-

tember 29th, 1949, and in this connection, Respondent alleges that Petitioners not only attempted to serve said case on appeal one day after the time allowed by law had expired, but Petitioners never did, at any time, properly serve a statement of case on appeal according to the laws, rules, practice and procedure established by the State of North Carolina for the perfecting of appeals to the Supreme Court of said State; it is admitted by Respondent that Petitioners caused two Petitions to be filed in the Supreme Court of North Carolina seeking a Writ of Certiorari and that the Supreme Court of North Carolina denied said Petitions for the reasons set forth in its opinion; it is admitted by Respondent that Petitioners sought a Writ of Error Coram Nobis and that the same was refused by the Supreme Court of North Carolina for the reasons set forth in the opinion of said Court dated December 14th, [fol. 39] 1949; it is admitted by Respondent that by virtue of a motion filed in the Supreme Court of North Carolina by the Attorney General, the attempted appeal of the Petitioners was dismissed after an examination of the record filed in the case; it is admitted by Respondent that Petitioners caused a Petition for a Writ of Certiorari to be filed in the Supreme Court of the United States, including a record of all of the proceedings in the case and a transcript of all of the evidence in the case, and that on or about May 8th, 1950, the Supreme Court of the United States denied said Petition for a Writ of Certiorari which had been filed by Petitioners; it is admitted by Respondent that Petitioners caused another Petition for a Writ of Error Coram Nobis to be filed in the Supreme Court of North Carolina and that said Petition was denied by said Court for the reasons given in an opinion dated May 24th, 1950; that Paragraph 2 of the Petition consists of allegations stated in the form of some facts, evidence, inferences and conclusions of counsel for Petitioners with an admixture of legal arguments and citations of legal authorities, all commingled together, and Respondent is advised and believes and, therefore, alleges that all allegations as to evidence, inferences and conclusions of counsel, legal arguments and citations of legal authorities should be stricken from said Petition; that except as herein admitted, and as may be admitted by Respondent in his further answer



to the Petition, the allegations of Paragraph 2 of the Petition are untrue and are, therefore, denied.

4. Answering the allegations of Paragraph 4 of the Petition, the Respondent alleges that Petitioners at all times had a full and ample remedy by appeal to the Supreme Court of North Carolina and could have had all questions and objections noted in the trial of the Superior Court of Pitt County reviewed in said Supreme Court, but to the contrary, Petitioners, acting through counsel of their own choice, indifferently, and without just cause or excuse, delayed and failed to perfect said appeal as provided by law; that the allegations of said Paragraph 4 of the Petition are, therefore, untrue and are denied.

5. Answering Paragraph 5 of the Petition, the Respondent admits that no previous application has been made by Petitioners for a Writ of Habeas Corpus; that except as herein admitted, the allegations of Paragraph 5 are untrue and are denied.

Further answering said petition for the purpose of the dismissal of same, and by way of Plea in bar of the relief sought in said petition, the Respondent, J. P. Crawford, Warden of the Central Prison of the State of North Carolina, says and alleges:

1. That the Petitioners were indicted for the crime of murder in the first degree in the Superior Court of Pitt County, North Carolina, for the killing of William Benjamin O'Neal, a taxicab driver; that the crime of murder in the first degree is prohibited by the statute and the laws of the State of North Carolina, and the penalty for said crime, upon a conviction for same, is death by asphyxiation as administered by the Warden of the Central Prison of the State of North Carolina; that the Superior Court of Pitt County is a Court of general jurisdiction, and it is alleged by Respondent that said Superior Court had jurisdiction over the offense charged against Petitioners and had jurisdiction over the persons of the Petitioners, and never at any time lost such jurisdiction during the trial of said Petitioners; that after said bill of indictment had been returned by the Grand Jury of Pitt County, it was made known to the Court that the defendants were charged with a capital offense and were financially unable to provide

counsel for themselves, and the Court thereupon appointed Arthur B. Corey and W. W. Speight, members of the Bar of Pitt County, to advise and represent the Petitioners in the trial of said cause; that the Respondent is advised and believes and so alleges: that the said Arthur B. Corey and W. W. Speight are well educated, trained, experienced and skillful trial lawyers, residing in Pitt County, with a wide knowledge of the customs and attitude of the people of said County and with a wide acquaintance of persons and citizens of the County selected and drawn for jury duty; that the Petitioners were arraigned upon said bill of indictment, and each of the Petitioners entered a plea of "Not Guilty"; that thereafter, the Petitioners were sent to the State Hospital at Goldsboro for study and examination [fol. 41] as to the mental condition and sanity of Petitioners, and this study and examination was made by Dr. I. C. Long, Superintendent of said State Hospital and an expert Psychiatrist; that thereafter, said case was continued until a term of Court held on May 30, 1949, and a report having been filed that Petitioners had sufficient intelligence and sanity to be placed on trial, Petitioners were placed upon trial at said term of Court; that at the April Term of Court, 1949, the Petitioners had employed Herman L. Taylor, a member in good standing of the Wake County Bar, and C. J. Gates, a member in good standing of the Durham County Bar, to represent them in the trial of said cause; that counsel accepted said employment, and this being made known to the Court, an order was entered discharging Arthur B. Corey and W. W. Speight from any further duties as counsel in said cause; that at said term of Criminal Court beginning on May 30th, 1949, and after the Petitioners had previously been arraigned and caused pleas of "Not Guilty" to be entered at a former term of Court, the Petitioners, for the first time, filed a motion to quash the bill of indictment and a challenge to the array of petit jurors; that after holding a hearing at which the Petitioners and the State introduced evidence, the Court overruled or dismissed said motion to quash and challenge to the array of petit jurors; that said cause was duly tried, and the jury, upon which one member of Petitioners' race served, returned a verdict of guilty of murder in the first degree, and the Petitioners were sep-

tenced to death, which penalty is mandatory under the laws of the State of North Carolina upon a conviction for such offense; that said Petitioners, together with said judgment of death, made in writing, were transmitted to the Respondent for the purpose of carrying out said sentence as required by law, and Respondent detains and has custody of Petitioners under said judgment or sentence of death as commanded by the Superior Court of Pitt County and for the purpose of executing and carrying out said judgment as provided by law; that a duly certified copy of the record and proceedings had in the trial of the Petitioners in the Superior Court of Pitt County, including a transcript of the [fol. 42] evidence as transcribed and reported by the official court reporter, and including a copy of the sentence or judgment of death by virtue of which Respondent detains and has custody of Petitioners, is hereto attached and made a part of this Paragraph as if fully set forth herein; that Respondent is advised and believes and so alleges: that said sentence or judgment was pronounced, entered and signed by a Court having jurisdiction to indict and place Petitioners on trial, that Petitioners were convicted after a regular, proper, lawful and constitutional trial was had, and said judgment or sentence pronounced upon Petitioners is valid, legal and constitutional, and such proceedings, trial and judgment are here pleaded in bar of any rights the Petitioners may have to seek the relief demanded in their Petition.

2. That as the Respondent is informed and believes, and as above set forth, Petitioners, after they had been arraigned and entered their pleas to the bill of indictment, filed a motion to quash the bill of indictment in which it was alleged that Negroes had been excluded from service on the Grand Juries of Pitt County in violation of the Fourteenth Amendment, and also entered a challenge to the array of petit jurors for the same reason; that in addition, as Respondent is informed and believes, Petitioners also contended that certain confessions made by them should not have been admitted in evidence over their objections because, as they contended, said confessions had been improperly and illegally secured in violation of the Fourteenth Amendment; that said motion to quash, challenge to the array and objections of Petitioners to the

admission of said confessions were heard and ruled upon by the trial Judge according to the practice, procedure, and laws established by the State of North Carolina, and Respondent is advised and believes and so alleges: that the Superior Court of Pitt County had jurisdiction over the Petitioners and the crime with which they were charged, that in the organization, selection, and constitution of the Grand Jury and Petit Jury and in the admission of said confessions, no violations of the Fourteenth Amendment were committed, and said Superior Court never, at any time, lost jurisdiction of said cause; that said motions and [fol. 43] objections were made, presented, heard and passed upon during the progress of the trial of Petitioners and appear in the record of said trial; that Respondent is informed and believes and so alleges: the State of North Carolina has, by its laws, provided the remedy of appeal in criminal cases, and any person convicted in a criminal case can avail himself of such remedy as a matter of right and have his trial reviewed by the Supreme Court of North Carolina; that the alleged violations of the Fourteenth Amendment asserted by the Petitioners in their motions and objections could have been reviewed by the Supreme Court of North Carolina, but Petitioners, acting through counsel of their own choice, neglected, failed and refused to properly serve a statement of case on appeal as required by the criminal procedure of the State of North Carolina, and as a result, upon motion of the Prosecuting Officer of the District, an order was entered by Williams, J., on the 29th day of September, 1949, striking out Petitioners' statement of case on appeal; that a certified copy of said order is attached hereto and made a part of this Paragraph and Answer; that such failure and neglect on the part of the Petitioners to exercise their right of appeal and to avail themselves of such remedy of review is hereby pleaded in bar of any right the Petitioners may have to maintain this proceeding; that Petitioners were indicted by a Grand Jury composed of persons eligible for such jury service, and Petitioners were convicted by a Petit or trial jury composed of persons eligible for such jury service, including a member of Petitioners' own race, and Respondent is informed and believes that Petitioners cannot now collaterally attack such judgment, proceeding and rulings of the State Court, even



though such rulings should be considered erroneous and thus convert a Habeas Corpus proceeding into a substitute for an appeal or Writ of Error.

3. That after Petitioners, acting through counsel of their own choice, had neglected, failed and refused to perfect their appeal to the Supreme Court of North Carolina in accordance with the procedure provided by said State and applicable to all persons convicted of criminal offenses, the Petitioners caused various proceedings to be instituted [fol. 44] as a substitute and in an attempt to have the same questions reviewed, which said questions, motions and objections could have been reviewed by the method of appeal, as follows:

(a) On September 27, 1949, Petitioners caused a Petition for a Writ of Certiorari to be filed in the Supreme Court of North Carolina, and thereafter, Petitioners caused a supplemental Petition to be filed in the same proceeding; that these Petitions were denied in an opinion of the Supreme Court of North Carolina reported as *State v. Daniels*, 231 N. C. 17, 56 S. E. (2nd) 2; that a certified copy of said proceedings, including the opinion of the Court, is hereto attached and made a part of this Paragraph and Answer.

(b) That thereafter, Petitioners caused a Petition to be filed in the Supreme Court of North Carolina in which they sought permission to file a Petition for a Writ of Error Coram Nobis in the Superior Court of Pitt County; that the State of North Carolina caused an Answer to be filed in this proceeding, and the Supreme Court of North Carolina denied this application or Petition in an opinion reported as *State v. Daniels*, 231 N. C. 241, 56 S. E. (2d) 546; that a certified copy of this proceeding, including the opinion of the Supreme Court, is hereto attached and made a part of this Answer and Paragraph.

(c) Thereafter, the Attorney General of North Carolina caused the record in the case to be docketed and filed a motion in the Supreme Court of North Carolina asking the Court to dismiss the appeal which the Petitioners had neglected and failed to perfect, and upon said motion, the Supreme Court of North Carolina dismissed said appeal and affirmed the judgment of the Superior Court of Pitt County; that the opinion of the Supreme Court of North

Carolina is reported as *State v. Daniels*, 231 N. C. 509, 57 S. E. (2d) 653; that a certified copy of said motion to dismiss said appeal, including the opinion of the Supreme Court of North Carolina, is hereto attached and made a part of this Paragraph and Answer.

(d) That thereafter, the Petitioners caused a Petition for a Writ of Certiorari to be filed in the Supreme Court of [fol. 45] the United States; that a record of said proceedings in the case was duly transmitted to the Supreme Court of the United States by the Clerk of the Supreme Court of North Carolina, and there was also sent to the Supreme Court of the United States a transcript of the evidence and proceedings in the Superior Court of Pitt County, which included Petitioners' motion to quash, challenge to the array and objections of Petitioners to the admission in evidence of the confessions of Petitioners; that the Supreme Court of the United States had before it a record of the entire proceedings in the State Courts, including the evidence, the brief of Petitioners filed in support of their application or Petition for a Writ of Certiorari and brief of the Respondent, State of North Carolina, opposing the Petition; that on the 8th day of May, 1950, the Supreme Court of the United States denied said Petition for Writ of Certiorari; that a copy of all of said proceedings filed in the Supreme Court of the United States wherein Petitioners sought a Writ of Certiorari, including the denial of the aforesaid Petition, as well as the briefs filed therein, are hereto attached and made a part of this Paragraph and Answer.

(e) That thereafter, the Petitioners caused another Petition for Writ of Error Coram Nobis to be filed in the Supreme Court of North Carolina, and the Petition in said proceeding presented the same questions that had been presented to the Supreme Court of the United States, and which had previously been presented to the Supreme Court of North Carolina when Petitioners first applied for a Writ of Error Coram Nobis in the former proceeding; that the State of North Carolina filed an Answer in this proceeding, and the Supreme Court of North Carolina denied said application or Petition for Writ of Error Coram Nobis in an opinion reported as 232 N. C. 196, — S. E. (2d) —; that

a certified copy of said proceeding in which Petitioners sought a Writ of Error Coram Nobis, including the opinion of the Supreme Court of North Carolina, is hereto attached and made a part of this Paragraph and Answer.

That in all of the proceedings above set forth and in their [fol. 46] various Petitions in said proceedings, Petitioners sought to attack the constitution, establishment and organization of the Grand Jury that returned the Bill of Indictment against Petitioners, the Petit Jury panel from which was selected the Jury that tried Petitioners, upon the grounds of racial discrimination in violation of the Fourteenth Amendment; that Petitioners likewise contended that their confessions were unlawfully procured in violation of the Fourteenth Amendment and that they had been deprived of their right of trial by jury because of the procedure in force in the State of North Carolina whereby the trial Judge determines the question of the voluntariness of confessions, and such question is not ultimately passed upon by the jury; that Petitioners filed a transcript showing the proceedings in the trial of the case in the Superior Court of Pitt County, both in the Supreme Court of North Carolina and in the Supreme Court of the United States; that of the above proceedings in the Supreme Court of North Carolina and in the Supreme Court of the United States are here pleaded as grounds for the dismissal of this Habeas Corpus proceeding, in discharge of any Writ of Habeas Corpus issued herein, and in bar of any rights that Petitioners may have to seek relief in this Habeas Corpus proceeding.

4. That as to Petitioners' motion to quash the bill of indictment upon the grounds that they had been deprived of equal protection of the law by discriminatory and arbitrary exclusion of Negroes from the Grand Juries of Pitt County, the Respondent is advised and believes and so alleges: that Petitioners did not file their motion to quash the bill of indictment until long after they had been arraigned and had entered pleas of "Not Guilty"; that Respondent is informed and believes that under these circumstances, the allowance of such a motion was within the discretion of the Court; that irrespective of his discretion, the trial Court held a hearing on the motion and evidence was produced by

the State showing that there had been no systematic, arbitrary and purposeful discrimination against or exclusion of persons of the colored race from service on Grand Juries [fol. 47] and likewise the same was shown as to the service of Negroes on the Petit Juries; that Negroes were drawn on the trial panel and one Negro served on the jury that convicted Petitioners; that the trial judge made findings of fact which are supported by the evidence and such findings of fact, as well as the whole transcript of the evidence and other proceedings in said trial in the Superior Court of Pitt County, are hereby referred to and made a part of this Paragraph and Answer; that Respondent is informed and believes that Petitioners were indicted by a Grand Jury composed of eligible persons for Grand Jury service, and Petitioners were convicted by a jury composed of eligible persons; that Petitioners having failed to have these questions reviewed on appeal to the Supreme Court of North Carolina cannot now collaterally attack said judgment upon such grounds; that even if there were defects in the constitution of said Grand Jury and Petit Jury, then, so far as this proceeding is concerned, such defects are irregularities and did not deprive the Superior Court of Pitt County of jurisdiction, said Court at all times having had jurisdiction over the offense charged against Petitioners as well as the person of each Petitioner, and such lack of capacity or authority to attack said judgment in a Habeas Corpus proceeding is here pleaded by way of dismissal, in discharge of any Writ of Habeas Corpus issued in this proceeding and in bar of any rights of Petitioners to have relief in this proceeding.

3. That as shown by the transcript of the evidence and the proceedings had at the trial of Petitioners, certain confessions of Petitioners were admitted in evidence against them; that according to the law and practice in force in the State of North Carolina, the trial Judge held a hearing and heard evidence from both the State and the Petitioners; that the trial Judge found that said confessions were freely and voluntarily given and admitted said confessions in evidence; that the transcript of evidence and proceedings had on this question are here referred to and made a part of this Paragraph and Answer; that Respondent is informed



and believes that said confessions were properly, legally and constitutionally procured and admitted in evidence, and no constitutional rights of the Petitioners were violated [fol. 48] in this respect; Respondent is informed and believes that the method of determining the voluntariness and admissibility of said confessions is in all respects in compliance with due process of law and other requirements of the Federal Constitution; that as the transcript shows, the trial Judge left it to the jury to determine what weight should be given to said confessions and as to whether or not the jury believed such confessions, as well as the sufficiency of the confessions to prove any matters of fact; that even if said confessions were erroneously admitted in evidence, the Petitioners could have had said error reviewed on appeal to the Supreme Court of North Carolina, which the Petitioners failed to do; that Respondent is informed and believes that Petitioners cannot now have said objections reviewed by means of a Habeas Corpus proceeding; that if the Court erred in such ruling, such erroneous admission in evidence of such confessions did not deprive the Court of jurisdiction, and Petitioners cannot now attack said judgment in a collateral manner and thus convert a Habeas Corpus proceeding into a substitute for an appeal or make use of same as Writ of Error.

6. Respondent, therefore, shows the Court that Petitioners are in his custody and are being detained by him pursuant to said judgment and commitment issued by the Superior Court of Pitt County, a certified copy of which is hereto attached, and Respondent will produce the original of said judgment as transmitted to him by the Clerk of the Superior Court of Pitt County on the hearing of this cause; that for the reasons above alleged, Respondent is informed and believes that said judgment was valid, legal and proper and was pronounced and signed by a Court having jurisdiction of the crime of which Petitioners were charged and tried; that said Court retained jurisdiction at all times and had the legal and constitutional authority to enter the judgment in this cause that is here exhibited; that as Respondent is informed and believes, he is entitled to the custody and is entitled to detain the Petitioners until such time as Petitioners may be dealt with and the judgment

[fol. 49] executed and carried out as provided by the laws of the State of North Carolina which are applicable to all persons regardless of race.

Wherefore, Respondent prays the Court:

1. That the Petition for a Writ of Habeas Corpus heretofore filed in this cause be dismissed.

2. That any Writ of Habeas Corpus that may have been issued or may issue or that may be issued in this cause be denied, dismissed and discharged.

3. That the order of injunction heretofore issued restraining Respondent and putting into effect the judgment or commitment under which the Respondent has custody of and detains the Petitioners be dismissed.

4. That the judgment and commitment under which Respondent holds Petitioners and under which he detains and has custody of Petitioners be declared to be a legal, valid and proper judgment and not subject to any attack in a Habeas Corpus proceeding.

5. That Respondent be authorized to carry out and execute said judgment in accordance with the laws and statutes of the State of North Carolina.

6. For such other and further relief to which Respondent may be entitled, and which may be proper in this proceeding.

Harry McMullan, Attorney General of North Carolina; Ralph Moody, Assistant Attorney General; R.<sup>o</sup> Brookes Peters, General Counsel of the State Highway and Public Works Commission; E. O. Brogden, Jr., Attorney and Member of Staff of State Highway and Public Works Commission, Attorneys for Respondent, J. P. Crawford, Warden of the Central Prison of the State of North Carolina, Raleigh, N. C.

[fol. 50] *Duly sworn to by J. P. Crawford. Jurat omitted in printing.*

STATE OF NORTH CAROLINA,  
Pitt County,  
Greenville Township, ss.:

STATE

vs.

BENNIE DANIELS and LLOYD RAY DANIELS

Before H. L. Jenkins, Justice of the Peace

WARRANT

Criminal Action

L. E. Manning being duly sworn, complains and says, that at and in said County, and Greenville Township on or about the 5th day of February, 1949, Bennie Daniels and Lloyd Ray Daniels did unlawfully, wilfully, feloniously, premeditatedly and deliberately, with malice aforethought, kill and murder William Benjamin O'Neal, against the form of the Statute in such cases made and provided, and contrary to law and against the peace and dignity of the State.

L. E. Manning.

Subscribed and sworn to before me, the 8th day of February, 1949. H. L. Jenkins, J. P.

STATE OF NORTH CAROLINA:

To any Lawful Officer of Pitt County—Greeting:

You are hereby commanded to arrest Bennie Daniels and Lloyd Ray Daniels and them safely keep, so that you have them before me at my office in said County, immediately, to answer the above complaint, and be dealt with as the law directs.

Given under my hand and seal this 8th day of February, 1949.

H. L. Jenkins, Justice of the Peace. (Seal.)

## JUDGMENT

After hearing the evidence in this case, it is adjudged that the defendant — Preliminary Hearing Waived — is guilty.

It is further ordered and adjudged that the defendants give a justified bond in the sum of None Dollars for their appearance at the Superior Court of Pitt County, to be held in Greenville, N. C., on the 28 day of March, 1949, and in default be committed to jail.

H. L. Jenkins, Justice of the Peace. (Seal.)

[fol. 52] Witnesses marked X recognized to appear.

Case tried 12 day of February, 1949.

Bond fixed at \$ None.

(On Back of Warrant): State vs. Bennie Daniels and Lloyd Ray Daniels. Warrant for Murder.

Summons for the State: L. E. Manning, R. W. Tyson, S. B. Dorsey, L. D. Page, M. E. Corbette, S. G. Gibbs, C. T. Manning, Henry Wilkens.

Rec'd the — day of —, 19—.

Exc'd the 9 day of Feb., 1949.

Ruel W. Tyson, Sheriff.

[fol. 53] IN SUPERIOR COURT OF PITT COUNTY

## INDICTMENT

The jurors for the State upon their oath do present, that Bennie Daniels and Lloyd Ray Daniels late of Pitt County, on the 5th day of February, A. D., 1949, with force and arms, at and in the said County, feloniously, wilfully, premeditatedly and deliberately, and of his malice aforethought, did kill and murder William Benjamin O'Neal, contrary to the form and the statute in such case made and provided, and against the peace and dignity of the State.

(S.) Wm. J. Bundy, Solicitor.

(On back of Indictment): No. 3579. State against Bennie Daniels and Lloyd Ray Daniels. Indictment, Murder.



Witnesses: L. E. Manning, S. G. Gibbs X, R. W. Tyson X, M. E. Corbette, S. B. Dorsey, C. T. Manning, L. D. Page, Henry Wilkens.

Those marked X endorsed and sent by the Solicitor, and sworn and examined by me.

W. H. Moore, Jr., Foreman Grand Jury.

X A True Bill.

W. H. Moore, Jr., Foreman Grand Jury.

[fol. 54] IN SUPERIOR COURT OF PITT COUNTY

### ORGANIZATION OF COURT

Be it remembered that at a Mixed Term of the Superior Court, begun and held for the County of Pitt at the Court-house in the City of Greenville, on the Twelfth Monday after the First Monday in March, 1949, it being May 30, 1949, His Honor Clawson L. Williams, Judge riding the Fifth Judicial District for Spring Term, 1949, present and presiding.

Hon. William J. Bundy, Solicitor of the Fifth Judicial District, present and prosecuting for the State.

Then comes Ruel W. Tyson, Sheriff of Pitt County and returns into Court that in obedience to a writ of Venire Facias heretofore issued to him by the Board of County Commissioners, he has summoned the following good and lawful men to serve as Jurors for the Term, to-wit: Names of jurors (omitted in printing).

[fol. 55] The following jurors of the regular panel were drawn from a hat by a child under 10 years of age and sworn, to-wit: List of jurors (omitted in printing).

[fol. 56] IN SUPERIOR COURT OF PITT COUNTY

[Title omitted]

ORDER OF SPECIAL VENIRE—June 1, 1949

It appearing to the Court that the panel of regular jurors drawn and summoned for this case having been exhausted after the selection of four jurors for the trial of this case,

and that the defendants being charged upon the Bill of Indictment with the capital offense of murder in the first degree, and in order to select a fair and impartial jury to try the case it is necessary that a special venire of one hundred and fifty (150) be had to supplement the regular panel of this term of court from which to select a jury.

Therefore, by consent, it is agreed that a special venire of one hundred and fifty be drawn in this case, and that the Register of Deeds and Clerk ex-officio to the Board of County Commissioners of this County forthwith produce the jury boxes of the County in open court and that there be drawn from Jury Box No. 1, by a child under ten years of age, one hundred and fifty (150) scrolls, the names of the persons on said scrolls to constitute a special venire from which to complete the jury in the trial of this case, and when drawn the said scrolls shall be placed in Jury Box No. 2.

It is further ordered that the Sheriff of this County immediately summon the persons so drawn, who shall be certified to him by the Clerk of this Court in a Writ of Venire Facias, personally to be and appear before the Court at nine-thirty o'clock a.m., on Thursday morning, the 2nd day of June, 1949, then and there to answer on oath touching their fitness and competency to serve as jurors.

And of this Writ make due return.

(S.) Clawson L. Williams, Judge presiding.

[fol. 57] IN SUPERIOR COURT OF PITT COUNTY

[Title omitted]

WRIT OF VENIRE FACIAS

To Ruel W. Tyson, Sheriff of Pitt County—Greeting:

I do hereby certify to you that the persons whose names hereinafter appear, in the list hereto attached and made a part hereof, are those persons drawn as a special venire in this case, pursuant to order of Hon. Clawson L. Williams, on June 1, 1949, and you will further take notice that you are commanded to have the said persons before the Court at the Courthouse in Greenville, on Thursday morning, June 2,

1949, at 9:30 A.M., then and there to answer on oath touching their fitness and competency to serve as jurors in this case.

Herein fail not and of this writ make due return.

(S.) D. T. House, Jr., Clerk, Superior Court.

[fols. 58-59] List of one hundred and fifty names (omitted in printing).

[fols. 60-62] IN SUPERIOR COURT OF PITT COUNTY

[Title omitted]

RETURN TO WRIT OF VENIRE—June 2, 1949

Obedient to the Writ of Venire Facias of the Clerk of Superior Court of Pitt County, I make the following returns. Those persons marked "Served" were summonsed to appear before the Court at the Courthouse in Greenville on June 2, 1949, at 9:30 A. M. Those not marked "Served" were either not found in Pitt County, deceased, or sick, as is shown opposite their names.

List of One Hundred and Fifty Names (omitted in printing).

[fol. 63] The following Jurors from the Special Venire summonsed by Ruel W. Tyson, Sheriff of Pitt County, were drawn from a hat by a child under 10 years of age and sworn, to-wit:

List of Jurors (omitted in printing).

It appearing to the Court and the Court finding that this trial is likely to be protracted. It is therefore ordered that a thirteenth alternate juror be selected.

R. W. King was sworn as an officer of the Jury.

[fol. 64] IN SUPERIOR COURT OF PITT COUNTY

[Title omitted]

ORDER OF ADDITIONAL SPECIAL VENIRE

It appearing to the Court during the progress of this trial and in the selection of the jury that the regular panel of jurors summoned for this term of court and the supplemental panel of special veniremen heretofore summoned from which to select a jury for the trial of this case has been exhausted and the jury not completed, and

It further appearing to the Court that the defendants stand indicted upon a Bill of Indictment duly returned by the Grand Jury of this County of the crime of murder in the first degree, and that in order to have a fair and impartial trial it is necessary that an additional special venire be had to supplement the regular panel and special venire, which are exhausted, from which to select the jury, consisting of thirty-five names.

It is therefore ordered that an additional special venire of thirty-five be drawn in this case to supplement the panel of regular jurors and the special venire heretofore exhausted for the purpose of selecting a jury in order that the defendant may have a fair and impartial trial, and to that end

It is ordered that the Register of Deeds and ex-officio clerk to the Board of County Commissioners forthwith produce in open court the jury boxes of the County, and that there be drawn from Jury Box No. 1 thirty-five scrolls by a child under ten years of age, the names of the persons on said scrolls to constitute a special venire from which to complete the jury in the trial of this case, and when drawn said scrolls shall be placed in Jury Box No. 2.

It is further ordered that the Clerk of this Court issue a Writ of Venire Facias to the Sheriff of this County commanding him that the persons so drawn be and appear before the undersigned Judge presiding over the Court at eight-thirty (8:30) p.m. Thursday, the 2nd day of June, [fol. 65] 1949, then and there to answer on oath touching their fitness and competency to serve as jurors in this case.

And of this Writ forthwith make due return.

(S.) Clawson L. Williams, Judge Presiding.



[fol. 66] IN SUPERIOR COURT OF PITT COUNTY

[Title omitted]

WRIT OF VENIRE FACIAS

To Ruel W. Tyson, Sheriff of Pitt County—Greeting:

I do hereby certify to you that the persons whose names hereinafter appear, in the list hereto attached and made a part hereof, are those persons drawn as a supplementary special venire of 35 in this case, pursuant to order of Hon. Clawson L. Williams, on June 2, 1949, and you will further take notice that you are commanded to have the said persons before the Court at the Courthouse in Greenville, on Thursday evening, June 2, 1949, at 8:30 P.M., then and there to answer on oath touching their fitness and competency to serve as jurors in this case.

Herein fail not and of this writ make due return.

(S. P. D. T. House, Jr., Clerk Superior Court.)

[fol. 67] 2nd Special Venire—List of Thirty-five Names (omitted in printing).

[fol. 68] IN SUPERIOR COURT OF PITT COUNTY

RETURN TO WRIT OF VENIRE

Obedient to the Writ of Venire Facias of the Clerk of Superior Court of Pitt County, I make the following returns. Those persons marked "Served" were summonsed to appear before the Court at the Courthouse in Greenville on June 2, 1949, at 8:30 P.M. Those not marked "Served" were either not found in Pitt County, deceased, or sick, as is shown opposite their names.

List of Thirty-five Names (omitted in printing).

[fol. 69] The following Jurors from the supplementary Special Venire summonsed by Ruel W. Tyson, Sheriff of Pitt County, was drawn from a hat by a child under 10 years of age and was sworn, to-wit:

List of jurors (omitted in printing).

[fol. 70] IN SUPERIOR COURT OF PITT COUNTY

[Title omitted]

ORDER

In the above entitled case it appearing to the Court that the present term of Superior Court will expire before completion of the trial of this case it is ordered that the present term of the Superior Court be and the same hereby is continued until the trial of this case is completed and disposed of.

(S.) Clawson L. Williams, Judge Presiding.

IN SUPERIOR COURT OF PITT COUNTY

[Title omitted]

JURY VERDICT—June 6, 1949

Jury return and say for their verdict that the Defendant, Bennie Daniels, is guilty of murder in the 1st degree as charged in the bill of indictment, and that the Defendant, Lloyd Ray Daniels, is guilty of murder in the 1st degree as charged in the bill of indictment.

[fol. 71] IN SUPERIOR COURT OF PITT COUNTY

[Title omitted]

JUDGMENT

The prisoner, Bennie Daniels, having been convicted of murder in the first degree by verdict of the Jury duly returned at this term of the Superior Court of Pitt County, North Carolina,

It is, therefore, ordered and adjudged that the said Bennie Daniels be, and he is hereby sentenced to death by asphyxiation, and the Sheriff of Pitt County, North Carolina, in whose custody the said defendant now is, forthwith convey such prisoner, Bennie Daniels, to the State Peni-

tertiary at Raleigh, North Carolina, and deliver said prisoner, Bennie Daniels, to the warden of the State's Penitentiary, who, the said Warden, on Friday the 15th day of July 1949, shall cause the said prisoner, Bennie Daniels, to inhale lethal gas of sufficient quantity and volume to cause the death of said prisoner, Bennie Daniels, which administration and inhalation of such lethal gas shall be continued until life is extinguished and the said prisoner, Bennie Daniels, is dead.

May God have mercy upon his soul.

(S.) Clawson L. Williams, Judge Presiding.

[fol. 72]

IN SUPERIOR COURT OF PITT COUNTY

[Title omitted]

APPEAL ENTRIES

Verdict: Guilty of murder in the first degree.

Upon the coming in of the verdict the defendant, Bennie Daniels, moved to set aside the verdict for that the same is contrary to the evidence, and moved for a new trial.

Motion denied and said defendant excepted.

Defendant moved for a new trial for errors committed by the Court in the reception of incompetent testimony and in the rejection of competent testimony and for errors in the Charge as given to the Jury.

Motion denied: Defendant again excepted.

The Court then pronounced Judgment.

To the foregoing judgment and sentence of the Court the defendant excepted and appeals therefrom to the Supreme Court. Further notice waived. 60 days allowed defendant to make and serve statement of case on appeal; 45 days thereafter allowed the State to make and serve amendments thereto or statement of counter-case on appeal.

On presentation of the requisite affidavit and certificate, as provided for in the statutes of this State, the defendant is permitted to appeal in forma pauperis, as set out in order this day signed.

[fol. 73] IN SUPERIOR COURT OF PITT COUNTY

[Title omitted]

JUDGMENT

The prisoner, Lloyd Ray Daniels, having been convicted of murder in the first degree by verdict of the Jury duly returned at this term of the Superior Court of Pitt County, North Carolina.

It is, therefore, ordered and adjudged that the said Lloyd Ray Daniels be, and he is hereby sentenced to death by asphyxiation, and the Sheriff of Pitt County, North Carolina, in whose custody the said defendant now is, forthwith convey such prisoner, Lloyd Ray Daniels, to the State Penitentiary at Raleigh, North Carolina, and deliver said prisoner, Lloyd Ray Daniels, to the Warden of the State's Penitentiary, who, the said Warden, on the Friday 15th day of July 1949, shall cause the said prisoner, Lloyd Ray Daniels, to inhale lethal gas of sufficient quantity and volume to cause the death of said prisoner, Lloyd Ray Daniels, which administration and inhalation of such lethal gas shall be continued until life is extinguished and the said prisoner, Lloyd Ray Daniels, is dead.

May God have mercy upon his soul.

(S.) Clawson L. Williams, Judge Presiding.

[fols. 74-77] IN SUPERIOR COURT OF PITT COUNTY

[Title omitted]

APPEAL ENTRIES

Verdict: Guilty of murder in the first degree.

Upon the coming in of the verdict the defendant, Lloyd Ray Daniels, moved to set aside the verdict for that the same is contrary to the evidence, and moved for a new trial.

Motion denied and said defendant excepted.

Defendant moved for a new trial for errors committed by the Court in the reception of incompetent testimony and in



the rejection of competent testimony and for errors in the Charge as given to the Jury.

Motion denied. Defendant again excepted.

The Court then pronounced Judgment.

To the foregoing judgment and sentence of the Court the defendant excepted and appeals therefrom to the Supreme Court. Further notice waived. 60 days allowed defendant to make and serve statement of case on appeal; 45 days thereafter allowed the State to make and serve amendments thereto or statement of counter-case on appeal.

On presentation of the requisite affidavit and certificate, as provided for in the statutes of this State, the defendant is permitted to appeal in forma pauperis, as set out in order this day signed.

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[fol. 78] Clerk's Certificate to foregoing transcript omitted in printing.

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[fol. 79] IN SUPERIOR COURT OF PITT COUNTY

[Title omitted]

ORDER ALLOWING MOTION TO STRIKE DEFENDANTS' STATEMENT OF CASE ON APPEAL, ETC.—October 1, 1949

This cause coming on to be heard, and being heard by consent on September 29, 1949, before the undersigned Judge of the Superior Court, at Kinston, North Carolina, upon motion of Wm. J. Bundy, Solicitor Fifth Judicial District, to strike out defendants' statement of case on appeal for failure of defendants to make up and serve statement of case on appeal within time fixed by the Court, the State being represented by Wm. J. Bundy, Solicitor Fifth Judicial District, and the defendants by Herman L. Taylor and C. J. Gates, the Court finds the following facts:

The above entitled case was tried before the undersigned Judge of the Superior Court at the regular term of the Superior Court of Pitt County beginning Monday, May 30, 1949. During said week of the trial of this case, it appearing to the Court that said term would expire before the comple-

tion of the trial of this case, an order was entered that said term be and the same was thereby continued until this case was completed and disposed of.

From verdict of guilty of murder in the first degree as to both defendants and judgment thereupon of death as provided by law the defendants gave notice of appeal and the following appeal entries were made:

"Notice of appeal given in open Court; Further notice waived, 60 days allowed defendants to make up and serve [fol. 80] statement of case on appeal 45 days thereafter allowed the State to make amendments thereto or statement of counter-case on appeal."

This case was completed and disposed of, and Court adjourned on June 6, 1949.

Statement of case on appeal was left in the office of the Solicitor of the Fifth Judicial District with the Solicitor's secretary, by the attorneys for the defendants on August 6, 1949, and a receipt taken from said secretary, in the absence of the Solicitor, as follows:

"Statement of case on appeal accepted by me this 6 day of August, 1949.

Wm. J. Bandy, by (S.) Mrs. M. H. Fields."

There was no extension or waiver of time within which to make up and serve statement of case on appeal other than contained in the appeal entries, and none requested.

The Solicitor, in serving amendments or exceptions to the defendants' statement of case on appeal, same being served on Herman L. Taylor, one of the attorneys for the defendants, by the Sheriff of Bertie County, on September 5, 1949, made reservations of rights as follows:

"The undersigned Solicitor of the Fifth Judicial District, not waiving any rights, and specifically reserving and now reasserting exception by the State to the failure of the defendants to serve Statement of Case on Appeal within the time fixed by the Court, and renewing its motion to strike the said Statement of Case on Appeal from the record, objects to the Statement of Case on Appeal as left at the Solicitor's office and offers the following exceptions or amendments thereto:"

[fol. 81] Written motion to strike out defendants' statement of case on appeal, for failure by the defendants to make up and serve statement of case on appeal within the time fixed by the Court was filed by the Solicitor, and served on Herman L. Taylor, one of the attorneys for the defendants, by the Sheriff of Wake County, on September 16, 1949.

The defendants, through their attorneys, Herman L. Taylor and C. J. Gates, admit that statement of case on appeal was left in the Solicitor's office with his secretary on August 6, 1949, and that same was not within the time of 60 days fixed by the Court.

The defendants' said statement of case on appeal, left in the Solicitor's office on August 6, 1949, as aforesaid, was not served within the 60 days fixed by the Court for the defendants to make up and serve statement of case on appeal.

It is agreed that order ruling upon said motion may be signed in or out of Lenoir County, and Fifth Judicial District.

It is, therefore, ordered that the motion of the Solicitor for the State to strike out the defendants' statement of case on appeal be and the same is hereby allowed; and said statement of case on appeal is hereby stricken out.

This the 1st day of October, 1949.

Clawson L. Williams, Judge Superior Court.

To the foregoing the defendants object and except and appeal to the Supreme Court.

Clawson L. Williams, Judge Superior Court.

[fol. 82] IN SUPREME COURT OF NORTH CAROLINA

STATE

VS.

BENNIE DANIELS and LLOYD RAY DANIELS

PETITION FOR WRIT OF CERTIORARI—Filed September 27, 1949

Bennie Daniels and Lloyd Ray Daniels, petitioners, respectfully show unto the court:

1. That at the March, 1949 Term of the Superior Court of Pitt County, North Carolina, that petitioners were indicted for the crime of first-degree murder.

2. That at the May 30, 1949 Term of said court petitioners were tried upon said bill of indictment and convicted of the capital crime of first-degree murder without recommendation of mercy.

3. That from the judgment of death pronounced by his Honor Clawson L. Williams, Judge Presiding, petitioners, with the allowance of the Court appealed in forma pauperis to the Supreme Court of North Carolina.

4. That the said May 30, 1949 Term of said court, at which petitioners were tried and convicted, was duly convened on the said 30th day of May, 1949, and the judgment of the Court was pronounced on June 6, 1949.

5. That the defendants were allowed sixty (60) days from the date of judgment in which to make out and serve case on appeal upon the Solicitor of the Fifth Judicial District, and the Solicitor was allowed thirty (30) days after such service to serve counter-case or exceptions thereto.

6. That some forty-five (45) or fifty (50) days elapsed before the court reporter attendant upon the said May 30, 1949 Term of the aforesaid court, at which petitioners were tried and convicted, due to her attendance at and upon other courts, delivered into the hands of the attorneys for petitioners the full and complete record of the proceedings had [fol. 83] in said trial.

7. That the record in the cause covers some four (4) volumes consisting of some five or six hundred pages.

8. That counsel for petitioners, with all of the diligent efforts they could bring to bear, being under the pressure of



other cases, both before this Court and pending in other inferior courts, as well as being retarded in the effort by the lateness of receipt of the complete record in the cause from the Court Stenographer, as aforementioned, served statement of case on appeal upon the Solicitor on the 6th day of August, 1949; that within thirty (30) days thereafter, the Solicitor filed some 122 exceptions to the case on appeal, in addition to a motion to strike same; that because of the filing of said exceptions and motion, it will be necessary for counsel for defendants and the Solicitor to meet with the Presiding Judge for a ruling on said exceptions and motion; that the aforementioned bearing will carry the settlement in this cause well beyond the date on which, under the rules of this Court, said cause should be docketed.

9. That cases from the Fifth Judicial District must be docketed in this Court on Tuesday, September 27, 1949.

10. That the inability to docket said cause within the time prescribed is not due to any lack of diligence or good faith on the part of and of the parties herein involved, but to the reasons previously set out.

11. That petitioner has caused to be docketed in the office of the Clerk of the Supreme Court of North Carolina contemporaneously with the filing of this petition the record prepared in this case as the same appears on the record in the office of the Clerk of Superior Court of Pitt County, North Carolina, properly certified to by said clerk.

12. That petitioner has a meritorious appeal, based upon prejudicial errors committed by the Court during the course of his trial, in particular; (1) in denying petitioner's motion challenging the array of petit jurors, timely lodged, upon the ground of systematic discrimination against, and disproportionate representation of, Negroes in the selection of petit juries and jurors in Pitt County, solely and wholly [Vol. 84] on the basis of race or color, your petitioner being of the Negro race; and (2) in admitting into evidence, over petitioner's objection, confessions which the record shows were extorted through fear and were involuntarily made.

Wherefore, petitioners pray that in order that they may be protected, the Court issue to the Clerk of the Superior Court of Pitt County, North Carolina, a writ of certiorari, to the end that the record and the case on appeal in its en-

to be certified to the Supreme Court of North Carolina, and that this cause be docketed and set by the Court for hearing at the end of the call of the calendar for the hearing of appeals from some other Judicial District other than the Fifth Judicial District.

(S.) Herman L. Taylor, J. Giles, Attorneys for Petitioners.

*Duly sworn to by Bernie Daniels and Lloyd Roy Daniels.  
Jurats omitted in printing.*

Proof of Service of Notice, Petition and Record (omitted in printing).

[fol. 85] IN SUPREME COURT OF NORTH CAROLINA

[Title omitted]

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI—October 10, 1949

Now come Bennie Daniels and Lloyd Ray Daniels, petitioners, through their attorneys, Herman L. Taylor and C. J. Gates, and respectfully show unto the Court:

1. That on the 27th day of September, 1949, petitioners filed in this Court a petition for writ of certiorari, praying the Court that they be allowed to docket the appeal which they duly noted at the May 30, 1949 term of the Superior Court of Pitt County, from a judgment and sentence of death for first-degree murder, at a time other than set for the docketing of appeals from the Fifth Judicial District, upon the ground that as the case on appeal in their cause had not been settled, they could not docket said case as required by the rules of this Court.

2. That in the said petition for certiorari, petitioners set out in paragraph eight thereof that an additional factor which precluded the timely docketing of their appeal was the filing by the Solicitor of a motion to strike the statement of case on appeal, in addition to numerous exceptions thereto, the hearing on which was set for a time subsequent to the day on which this appeal should have been docketed under the rules of this Court.

3. That on Thursday, September 29, 1949, a hearing was held in the Superior Court of Lenoir County before the Honorable Clawson L. Williams, Judge, who presided over the trial of this cause, on the motion of the Solicitor to strike defendants' statement of case on appeal, for that the same was not served within the time set by the order of the court, entered on the day the appeal was noted, but was one day late, to wit, defendants had sixty days from June 6th in which to prepare and serve the case on appeal, and said [fol. 86] service was attempted on August 6th.

4. That His Honor Clawson L. Williams, on the 1st day of October, 1949, issued an order allowing the motion of the Solicitor to strike defendants' statement of case on appeal and ordered same to be stricken.

5. That a detailed affidavit of one of counsel for defendants, attached hereto and prayed to be made a part hereof, sets out that personal service of the statement of case on appeal was not had and could not be had on the Solicitor of the Fifth Judicial District on the day on which time for serving case on appeal expired, for that the said Solicitor was neither in his office nor at home, but was out of town and was not expected back before three days after the deadline for serving case on appeal; that counsel for defendants did not know of the whereabouts of the Solicitor or how to contact him with respect to serving case on appeal.

6. That defendants' failure to perfect their appeal, as set out in the affidavit of counsel, was not and is not due to any laches on the part of them or their counsel.

7. That the trial Judge having allowed the striking of defendants' statement of case on appeal, petitioners have no other remedy whereby their cause may be brought before this Court except by the granting of the writ herein prayed for.

8. That as specifically pointed out in the petition filed in this Court on the 27th day of September, 1949, to which this petition is a supplement, petitioners have a meritorious appeal, based upon prejudicial errors committed by the court during the trial of their cause.

Wherefore, petitioners pray the Court that in order that they may be fully protected in their life and limbs that the writ herein prayed for be allowed and that they be given

leave to bring their said cause before this Court upon certiorari.

This 10th day of October, 1949.

Bennie Daniels & Lloyd Ray Daniels. By (S.) Herman L. Taylor, Attorney for Petitioners.

[fol. 87] *Duly sworn, to by Herman L. Taylor. Jurat omitted in printing.*

[fol. 88]

#### AFFIDAVIT

Herman L. Taylor, being first duly sworn, deposes and says: that he is a practicing attorney in the courts of the State of North Carolina; that he is one of the counsel of record for the defendants in the above entitled matter; that as such he has been in charge of the preparation of defendants' case on appeal, in particular, the preparation and service of statement of case on appeal in the above entitled matter;

That on the 6th day of June, 1949, a judgment of death by asphyxiation was rendered against the defendants, upon a verdict of guilty of first-degree murder; that from said judgment defendants noted an appeal to this Court and were allowed sixty (60) days in which to make out and serve statement of case on appeal upon the solicitor for the Fifth Judicial District; that some fifty (50) or fifty-one (51) days, out of the sixty (60) days allowed defendants in which to prepare statement of case on appeal, passed before counsel for defendants received the full and complete record in this cause; that the record in this cause comprises some four volumes, consisting of some 500 or more pages; that approximately one month passed before counsel for defendants received even the first volume of said record, consisting of some 300 or more pages, as is evidenced by a letter of the stenographer attendant upon the term of court at which defendants were convicted and sentenced, a copy of which letter is hereto attached;

That despite the delay in receipt of the record in this cause, counsel for defendants made all diligent efforts to



prepare statement of case on appeal within the time prescribed by the order of the court; that although the last volume of the record on appeal was received only about [fol. 89] one week prior to the expiration of the time for service of statement of case on appeal, counsel for defendants, by the exertion of diligent and painstaking efforts, completed preparation of the said statement of case on appeal in the afternoon of Thursday, August 4th; one day prior to the deadline; that on the morning of Friday, August 5, 1949, the last day on which service of statement of case on appeal could have been made, under the order of the court setting time for service of statement of case on appeal, he, Herman L. Taylor, telephoned the office of the Honorable William J. Bundy, Solicitor, in Greenville, North Carolina, from Fayetteville, North Carolina, where he was engaged in another matter, attempting to contact him with respect to service of case on appeal in this matter; that upon being told by the telephone operator that the Solicitor was not in his office, he talked to Mrs. M. W. Fields, secretary in the office of the Solicitor; that the said Mrs. M. W. Fields stated to him that the Solicitor was not in his office, was not at home, that he was out of town and could not be reached until he returned to his office on Monday morning, August 8th; that in default of being able to contact the Solicitor in person, on Saturday morning, August 6th, he left a copy of the statement of case on appeal at the office of the Solicitor with his secretary and received in return a signed statement of acceptance of said statement of case on appeal by the said Mrs. M. W. Fields, on behalf of the Solicitor, a copy of which acceptance is attached hereto;

That at the hearing before His Honor Clawson L. Williams, held by agreement, in Kinston, North Carolina, on Thursday, September 29th, the Honorable Solicitor admitted that he had forgotten that service of statement of case on appeal in the above entitled matter was due to be made during the week of August 1st, and further admitted that he and his family were at a beach on the morning of Friday, August 5th, when counsel for defendant attempted to contact him by telephone and that he did

not return to Greenville until Sunday evening, August 7th, and to his office until Monday, August 8th.

(S.) Herman L. Taylor, Affiant.

Subscribed and sworn to before me this 10th day of October, 1949. Hellon F. Bray, Notary Public,

[fols. 90-91]

Goldsboro, N. C., July 2nd, 1949.

Mr. Herman L. Taylor, Raleigh, N. C.

Dear Sir:

Re: State vs. Bennie Daniels and Lloyd Ray Daniels.

I am in receipt of your letter in regard to transcript in the above case and am today sending you 305 pages of same. I have been in court almost every day since the case was tried and have been working on the evidence nights and as it is so long I am afraid you will not have time to get it up if I wait until I finish it. I hope to finish the transcript by the last of next week but in case I do not I will send you another volume and let you have it all at the very earliest possible moment.

Very truly yours, (S.) Kate Wade, Box 360, Goldsboro, North Carolina.

[fols. 92-101] OPINION DENYING PETITION FOR CERTIORARI REPORTED 231 N.C. 17, 36 S.E. 2d 2 (omitted in printing)

[fol. 102] IN SUPREME COURT OF NORTH CAROLINA

[Title omitted]

PETITION FOR PERMISSION TO FILE PETITION FOR WRIT OF ERROR CORAM NOBIS IN SUPERIOR COURT OF PITT COUNTY

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the State of North Carolina.

Now come Bennie Daniels and Lloyd Ray Daniels petitioners, and respectfully show unto the Court:

1. That at the March, 1949 Term of the Superior Court of Pitt County, petitioners were indicted for the crime of first-degree murder.

2. That at the May 30, 1949 Term of said Court petitioners were tried upon said bill of indictment and convicted of the capital crime of first-degree murder without recommendation of mercy.

3. That upon the verdict of the jury His Honor Clawson L. Williams, Judge Presiding, pronounced a judgment of death against petitioners; that from such judgment and sentence petitioners, with the allowance of the court, appealed in forma pauperis to the Supreme Court of North Carolina.

4. That on September 29, 1949, His Honor Clawson L. Williams, upon motion by the Solicitor, entered an order striking petitioner's statement of case on appeal, for that the same was not filed within the time set out by the Court in the appeal entries.

5. That on September 27, 1949 petitioners filed before this Court a petition for writ of certiorari, and on October 11, 1949, a supplementary petition for writ of certiorari, praying the court to consider and entertain their cause upon said writ.

6. That on November 2, 1949, this Honorable Court handed down an opinion in which petitioners' application for writ of certiorari was denied.

7. That your petitioners are in this petition seeking of this Honorable Court, as the sole legal remedy remaining [fol. 103] to them, leave to petition the Superior Court of Pitt County for a writ of error coram nobis, to the end that the merits of their appeal may be considered.

8. That petitioners strongly urge upon this Court that they have a meritorious appeal, well founded in law and fact, based upon errors committed by the trial court during the course of their trial, in particular in (1) denying petitioners' motion challenging the array of petit jurors, timely lodged, upon the ground of systematic discrimination against Negroes in the selection of petit juries and jurors in Pitt County, solely and wholly on the basis of race and/or color, your petitioners being of the Negro race, and (2) admitting into evidence, over petitioners' objection alleged confessions which the record shows were extorted through fear and involuntarily made, whereby your petitioners were denied the equal protection of the laws and are about to

be deprived of their lives without due process of law, both in contravention of the Constitution and laws of the State of North Carolina, and the Constitution and laws of the United States.

9. That the full record in this cause will show, with respect to petitioners' objection to the trial court's admitting into evidence their alleged confessions, that petitioners were taken in the dead of night by police officers from among their relatives and friends, held incommunicado and threatened and questioned for a considerable period of time by relays of police officers, en route to and in jail in Williamston, North Carolina, where they were taken after their capture, and it was under these circumstances, which are more fully set out in the record, that the alleged voluntary confessions were made; that your petitioners averred to the trial court, and do now aver to this Honorable Court, that such statements made by them in the nature of confessions of guilt of the crime with which they were charged, were made involuntarily, and extorted through fear.

10. That your petitioners are two ignorant, abject Negro youths, both of about 18 years of age, one of whom has never been privileged to go to school, and the other having gone only to the second grade in school; that all of their [fol. 104] lives have been spent in and about Pitt County with their parents tenant farming.

11. That petitioners pray the court that they be allowed to adopt the record and proceedings which were before this Court upon their petition for writ of certiorari, as a part of this petition, if the same be necessary to put their cause more fully before this court upon this petition.

12. That your petitioners are, contemporaneously with the filing of this petition before this Court, giving notice of the filing of such petition, together with a copy of the same, to the Honorable Harry McMullan, Attorney General, and the Honorable William J. Bundy, Solicitor for the Fifth Judicial District.

Wherefore, petitioners pray this Honorable Court that in the exercise of its supervisory powers and control over the inferior courts of this state, that they be given leave to apply to the Superior Court of Pitt County for a writ of



error coram nobis, so that the errors of which they complain may be inquired into and they thereby be more fully protected in their life and limbs.

(S.) Bennie Daniels, Lloyd Ray Daniels.

[fol. 103] IN SUPREME COURT OF NORTH CAROLINA

[Title omitted]

ANSWER TO PETITION

The Attorney General, answering the Petition for permission to file Petition for Writ of Error Coram Nobis in the Superior Court of Pitt County, for his Answer, says:

1. The allegations contained in Paragraphs 1, 2, 3, 4, 5 and 6 of the Petition are admitted.

2. Answering the allegations contained in Paragraph 7, it is admitted that petitioners are seeking the permission of this Court to file a petition in the Superior Court of Pitt County for a Writ of Error Coram Nobis; it is denied, however, that the petitioners are entitled to any such remedy or that the petitioners occupy such a status as entitles them to seek such a remedy.

3. The allegations contained in Paragraph 8 are denied.

4. The allegations contained in Paragraph 9 are denied.

5. Answering the allegations contained in Paragraph 10, the Attorney General alleges that he has not sufficient knowledge or information to form a belief as to the truth of said allegations and, therefore, denies the same.

6. Answering the allegations contained in Paragraph 11, the Attorney General alleges that he has no objection to an adoption of the record and proceedings which were before this Court upon Petition for Certiorari, including the evidence, charge of the Court, motion to quash, and findings of fact and order entered thereon. It is alleged that the complete record of all the proceedings had in the Superior Court of Pitt County should be adopted for the [fol. 106] information of this Court upon this Petition.

7. Answering the allegations contained in Paragraph 12, it is admitted that notice was served on the Attorney General, and it is not denied that notice has been served upon the Solicitor of the Fifth Judicial District; the remaining allegations of said paragraph are untrue and are denied.

Further answering said Petition, by way of plea in bar of any relief sought by the petitioners in this cause, the Attorney General alleges:

1. That the petitioners were convicted of the crime of first degree murder in the Superior Court of Pitt County at the March Term, 1949, of said Court; that sentence was duly pronounced against both petitioners according to law; that petitioners caused notice of appeal to the Supreme Court of North Carolina to be entered in said case through their counsel, and the petitioners were given sufficient time in which to prepare and serve their statement of case on appeal to the Supreme Court.

2. That due to the laches and negligence on the part of counsel for the petitioners, said appeal was never perfected because counsel for petitioners failed to serve statement of case on appeal in apt time as it was their duty to do, and the judge before whom the petitioners were tried entered an order striking out petitioners' statement of case on appeal for such reason; that all of these facts and matters were presented before this Court on an application for Certiorari filed in this Court, and the facts are recited in the opinion issued by this Court dismissing such application and Petition for Writ of Certiorari; that said opinion is hereby referred to and made a part of this Further Answer.

3. That when the petitioners were tried before the Superior Court of Pitt County, at the March Term, 1949, counsel for the petitioners filed a motion to quash the bill of indictment and challenged the array of petit jurors upon the grounds that members of petitioners' race had been systematically and systematically excluded from jury service in said County, as will appear in said written motion and the record in evidence in said cause; that during said trial, as will appear from the evidence, the State introduced and used certain confessions made by the petitioners, and each of them, which appear on p. 273 of the record of

the evidence and p. 276 of said record, the same being State's Exhibits 8 and 9; that other evidence was offered showing that these petitioners made confessions as to their guilt, as will appear in the record of the evidence; that on the motion to quash on the grounds of race exclusion as to jury duty, the trial Court heard evidence, considered the matter fully and made findings of fact in great detail, and from said findings of fact, the Court ordered and adjudged that the motion to quash the bill of indictment and the challenge to the array of jurors be overruled; that said findings of fact and order of the Court are referred to and made a part of this Further Answer; that as to the competency of the confession of the petitioners, the Court heard evidence and duly considered the question according to the practice in this jurisdiction and overruled the petitioners' objections and admitted said confessions, all of which appears in the record of the evidence, elicited before the trial Court and jury.

4. That as the Attorney General is informed and believes and so alleges, the matters and things upon which the petitioners now seek redress relate to said motion to quash for jury discrimination and the overruling of the Court thereon and also relate to the confessions made by the petitioners and the ruling of the Court on said confessions. It is alleged, therefore, that these matters were brought to the attention of the Court, were adjudicated and passed upon according to the merits of same and both upon facts and law and that the proper redress or remedy of the petitioners, if said rulings were erroneous, was an appeal to the Supreme Court of North Carolina. It is alleged that the matters and things now set up by petitioners as a basis or grounds for [fol. 108] permission to file a Petition for Writ of Error Coram Nobis have already been brought to the attention of the Court by counsel for the petitioners, have been adjudicated and passed upon, and petitioners cannot now assert any alleged error with respect thereto as grounds for seeking the writ herein requested; that no duress, fraud or mistake of fact has been committed which is of such a nature as will give this Court jurisdiction or authority to issue the writ herein sought.

Wherefore, having fully answered, the Attorney General prays the Court that the Petition or application of the petitioners herein be dismissed.

\_\_\_\_\_, Attorney General of North Carolina.  
\_\_\_\_\_, Assistant Attorney General.

*Duly sworn to by Ralph Moody. Jurat omitted in printing.*

[fols. 109-113] ARGUMENT (omitted in printing)

[fol. 114] IN SUPREME COURT OF NORTH CAROLINA

[Title omitted]

#### ORDER DENYING PETITION

PER CURIAM: <sup>5</sup>

The defendants were tried at March Term, 1949, of the Superior Court of Pitt County, convicted of first degree murder, the jury not recommending mercy, were sentenced to death, and appealed. Counsel for defendants, having failed to serve case on appeal within the time allowed, sought by *certiorari* to have the appeal sent up. *Certiorari* was denied, defendants not having shown sufficient grounds therefor under the rules and practice of the Court. *State v. Daniels*, 231 N. C. 17; *In re Taylor*, 230 N. C. 666; *In re Taylor*, 229 N. C. 297, 49 S. E. (2d) 749, q. n.

Counsel for petitioners were advised, however, that petition might be filed here for permission to apply to the Superior Court of Pitt County, where the cause was tried, for a writ of error *coram nobis*, through which, if allowed there, they might be heard on the main features on which they asked for relief, which included matters *dehors* the record, and that appeal would lie to the Supreme Court in the event of its unfavorable action. *State v. Daniels*, *supra*; *In re Taylor* (230 NC) *supra*; *In re Taylor* (229 NC) *supra*.

The defendants now file a petition for permission to apply to the Superior Court for such a writ. Their petition does



not make a *prima facie* showing of substance which is necessary to bring themselves within the purview of the writ. Citations, *supra*.

The petition is insufficient to justify the Court in issuing the writ and instigating the incident procedure in the court below. State v. Daniels, *supra*; *In re Taylor*, (229 NC) *supra*.

The petition is, therefore, denied.

[fol. 115] IN SUPREME COURT OF NORTH CAROLINA

[Title omitted]

MOTION TO DOCKET AND DISMISS UNDER RULE 17

#### Statement

This is a criminal action tried before his Honor, Clawson L. Williams, Judge, and a jury at the May Term, 1949, of the Superior Court of Pitt County.

The defendants, Bennie Daniels and Lloyd Ray Daniels, were tried on a bill of indictment charging them with murder in the first degree, and upon such trial, the jury returned a verdict of guilty of murder in the first degree; and from judgment pronounced upon the verdict, the defendants, and each of them, gave notice of appeal to the Supreme Court of North Carolina.

On October 1st, 1949, Judge Williams heard this matter upon motion to strike out the defendants' statement of case on appeal for that the defendants had failed to make up and serve the same within the time fixed by the Court. It appeared that the attempted service of the case on appeal was not within the sixty (60) days fixed by the Court; that thereafter, the defendants filed their petitions for certiorari in the Supreme Court of North Carolina, such filing having been made on the 10th day of October, 1949, and the record [fol. 116] proper in said case was attached and made a party of the petitions for certiorari, as will appear in the office of the Clerk of the Supreme Court.

On November 2nd, 1949, the Supreme Court filed its opinion dismissing defendants' petition for certiorari, as

will appear and as reported in 231 N. C. 17; that thereafter, the defendants filed a petition or application in the Supreme Court for permission to apply to the Superior Court for a writ of error coram nobis; that said application has been refused in an opinion of the Supreme Court filed on December 14th, 1949; that the entries of appeal made by defendants are still outstanding on the Court docket and have not been acted upon or dismissed; that since said entries of appeal have been entered, no case on appeal was or has been docketed in the Supreme Court. The transcript of the record proper in this case heretofore filed in the office of the Clerk of the Supreme Court is made a part of this motion.

### Motion

The defendant having failed to perfect his appeal in the time required by law, and having failed to file a proper case on appeal in this Court, the Attorney General moves the Court that the case be docketed, the appeal dismissed, and the judgment of the lower Court affirmed under Rule 17 of the Rules of Practice in the Supreme Court.

Respectfully submitted, Harry McMullan, Attorney General; Ralph Moody, Assistant Attorney General.

[fols. 117-119] IN SUPREME COURT OF NORTH CAROLINA,  
SPRING TERM, 1950

[Title omitted]

### ORDER OF AFFIRMANCE

#### PER CURIAM:

The defendants were tried and convicted at the May Term, 1949, of Pitt County Superior Court, on an indictment charging murder in the first degree, and were sentenced to death, from which judgment they gave notice of appeal. Not having served Case on Appeal in apt time they applied to this Court for a writ of *certiorari* for bringing up the Case on Appeal, which was denied for want of merit. State v. Daniels, p. 17, *ante*. Subsequently they petitioned

the Court for leave to file a writ of error *coram nobis*; and not having brought themselves within the purview of such a writ, petition was denied. *State v. Daniels*, p. 241, *ante*. The above cited reports are referred to for a history of the case.

No case on appeal having been filed in the office of the Clerk, the Attorney General has caused the record proper to be filed in this Court and moves that the case and record be docketed and the appeal dismissed under Rule 17 of the Rules of Practice of the Court.

We have carefully examined the record filed in this case and find no error therein. For the causes stated the motion of the Attorney General is allowed; the judgment of the lower court is affirmed and the appeal is dismissed. *S. v. Watson*, 208 N. C. 70, 179 S. E. 455; *S. v. Johnson*, 205 N. C. 610, 172 S. E. 219; *S. v. Goldston*, 201 N. C. 89, 158 S. E. 926; *S. v. Hamlet*, 206 N. C. 568, 174 S. E. 451.

As to each defendant: *Judgment affirmed; Appeal dismissed.*

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[fols. 120-121] IN SUPREME COURT OF NORTH CAROLINA

[Title omitted]

ORDER STAYING EXECUTION OF JUDGMENT—March 2, 1950

Upon consideration of the foregoing petition and motion of counsel for the defendant appellants, Bennie Daniels and Lloyd Ray Daniels, for an order staying the mandate and sentence of death herein, pending application to the Supreme Court of the United States for writ of certiorari, it is now here ordered that said motion be granted, and the mandate and sentence of death in this case be, and the same is hereby, stayed until the final determination of this case in the United States Supreme Court, on condition, however, that said petition for certiorari be submitted to the Supreme Court of the United States within the time required by law.

It appearing that the defendants are now confined on death row in the State Prison of North Carolina and are not entitled to bond under the laws of North Carolina; it is, therefore, ordered that no bond is allowed, but that the

prisoners shall remain in said State Prison, and the sentence of death shall be stayed pending said appeal.

This 2nd day of March, 1950.

(S.) Walter P. Stacy, Chief Justice of the Supreme Court of North Carolina.

[fol. 122] Proof of Service of Notice, Petition, Brief, and Record—(Omitted in Printing)

[fols. 123-154] Petition for Writ of Certiorari to the Supreme Court of North Carolina and/or to the Superior Court, Pitt County, North Carolina—(Omitted in Printing)

[fol. 154a] Brief of the State of North Carolina, Respondent, Opposing Petition for Writ of Certiorari—(Omitted in Printing)

[fols. 155-162] Reply Brief of Petitioners in Support of Petition for Writ of Certiorari—(Omitted in Printing)

[fol. 163] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1949

No. 412, Misc.

[Title omitted]

ORDER DENYING PETITION FOR WRIT OF CERTIORARI—May 8, 1950

On Petition for Writ of Certiorari to the Supreme Court of the State of North Carolina.

On consideration of the petition for a writ of certiorari herein to the Supreme Court of the State of North Carolina, it is ordered by this Court that the said petition be, and the same is hereby denied.

(S.) Hugh W. Barr, Deputy Clerk.

[fol. 164] Clerk's Certificate to foregoing transcript omitted in printing.



[fols. 165-166] IN SUPREME COURT OF NORTH CAROLINA

[Title omitted]

ORDER AFFIRMING JUDGMENT

In accordance with the certified copy of the mandate of the Supreme Court of the United States denying petition for writ of certiorari, dated May 8, 1950, received and filed in the office of the Clerk of this Court May 12, 1950, the judgment heretofore entered in the above entitled case, opinion filed March 1, 1950, is affirmed.

This the 24 day of May, 1950.

(S.) Sam J. Ervin, Jr., Associate Justice of the Supreme Court of North Carolina, For the Court.

[fols. 167-185] Notice and Petition for Permission to file Petition for Writ of Error Coram Nobis in Superior Court of Pitt County. (Omitted in printing.)

[fols. 186-202] Answer to Petition or Application for Writ of Error Coram Nobis. (Omitted in printing.)

[fol. 203] IN SUPREME COURT OF NORTH CAROLINA, SPRING TERM, 1950

[Title omitted]

ORDER DENYING PETITION FOR WRIT OF ERROR CORAM NOBIS

PER CURIAM:

The petitioners, Bennie Daniels and Lloyd Ray Daniels, were tried at May Term, 1949 of Pitt County Superior Court on an indictment charging them with the murder of William Benjamin O'Neal, and were convicted of murder in the first degree, without recommendation of mercy, and were sentenced to death. From this judgment they gave notice of appeal to the Supreme Court of North Carolina; and an order was made permitting them to appeal *in forma pauperis*. Not having perfected that appeal by serving case on appeal within the time allowed, they petitioned this Court

for a writ of *certiorari* to bring up the case on appeal, which writ was denied for want of merit. *State v. Daniels*, 231 N. C. 17.

They then filed in this Court a petition for permission to file in the court of trial, to-wit, the Superior Court of Pitt County, a writ of error *coram nobis*. This petition was denied for want of substantial merit, and because it failed to bring the application within the purview of such a writ. *State v. Daniels*, 231 N. C. 341.

On motion of the Attorney General the appeal of defendants was dismissed by this Court in decision filed March 1, 1950, *State v. Daniels*, 231 N. C. 509.

The present petitioners thereupon filed in the Supreme Court of the United States a petition for *certiorari* to have the matter reviewed in that Court, and proceedings here were stayed by order of Chief Justice Staey, pending action upon said petition.

On May 8, 1950, the Supreme Court of the United States [fol. 204] denied the petition without opinion, and this denial has been duly certified to this Court.

The petitioners now again petition this Court for leave to file a petition in the Superior Court of Pitt County for a writ of error *coram nobis*; and incorporate in that petition substantially matters that were presented to the Supreme Court of the United States in their petition to that Court for *Certiorari*. On the face of the petition it appears that these are matters fully presented to the Court upon their trial and there passed upon.

The function and limitations of the writ of error *coram nobis* were called to the attention of counsel for the petitioners when the petition for *certiorari* to bring up the case on appeal was dismissed in this Court. *State v. Daniels*, 231 N. C. 17, *supra*; and again in the subsequent decision dismissing the petition for leave to file a petition for such writ in the trial court.

The writ of error *coram nobis* obtains in this Court only by virtue of adoption of the common law; In re Taylor, 229 N. C. 297; In re Taylor, 230 N. C. 566, *supra*; *State v. Daniels*, 231 N. C. 17, *supra*; and is attended with its common law limitations.

The writ of error *coram nobis* is not a substitute for

appeal. Under our practice permission to petition the Superior Court in which the petitioning defendant was tried is given only when the matter on which the petition is based is "extraneous to the record." *State v. Taylor*, 229 N. C. 297, 49 S. E. (2d) 749; *In re Taylor*, 230 N. C. 566; 63 Am. Jur., p. 766, Sec. 1276; 4 C. J. S., Sec. 9.

We understand that the petition for *certiorari* presented to the Supreme Court of the United States comprehended all matters which might be pleaded in that Court in the premises, and upon which the petitioners may now rely.

The petition is denied.

Petition Denied.

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[fols. 205-206] Clerk's Certificate to foregoing transcript omitted in printing.

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[fol. 207]

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

WRIT OF HABEAS CORPUS—Filed July 10, 1950

To United States of America:

To J. P. Crawford, Warden, Central Prison of the State of North Carolina, Raleigh, North Carolina, Greeting:

The above entitled matter having come on for hearing before me, Don Gilliam, Judge of the United States District Court for the Eastern District of North Carolina, upon a petition for a writ of habeas corpus filed by the above named petitioners on the 2nd day of June, 1950, and an order to show cause issued to and upon you by the Court pursuant to said petition on the 5th day of June, 1950, and upon a return and answer made to said order to show cause on the 24th day of June, 1950; and it appearing to the Court, upon due consideration of the allegations set out in the said petition and the answer and return made thereto, that serious issues of fact have been and are

raised with respect to the constitutionality of the detention and imprisonment of the said petitioners, which issues warrant a full investigation into said matter by the Court;

It is therefore ordered and commanded that you have the body of Bennie Daniels and Lloyd Ray Daniels, by whatever name they may be called, if they be now in your custody and control, before me, the undersigned, at the United States District Court, in the City of Wilson, North Carolina, at 10:00 o'clock a. m., on the 30th day of October, 1950, together with a return of this writ in writing, showing whether you have said parties in your custody, or under your power or restraint, and if so, the authority and cause of such imprisonment or restraint, setting forth the same at large; then and there to receive, abide by, and perform such orders as may be made in the premises. And have you then and there this writ.

[fol. 208] It is further ordered that the above named prisoners shall, from the date of service of this writ upon you, be transferred into and held under the custody and control of this Court from the said date of service of said writ until the said 30th day of October, 1950, the return day of said writ; and the said prisoners shall be detained under the authority of this court, as aforesaid, in the Central Prison of the State of North Carolina, in the City of Raleigh, North Carolina.

It is further ordered that the Clerk of this Court shall serve, or caused to be served, a copy of this writ upon the Attorney General of the State of North Carolina.

Issued this 8th day of July, 1950.

Don Gilliam, Judge, United States District Court.

[fol. 208a] Proof of Service—(Omitted in Printing)



[fol. 209] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

REPLY OF PETITIONERS—Filed August 7, 1950

The petitioners, Bennie Daniels and Lloyd Ray Daniels, replying to the Answer of the respondent to their petition for writ of habeas corpus, say:

1. That they deny each and every allegation of paragraph 2 of the Answer except insofar as said paragraph admits allegations contained in paragraph 2 of the petition.

2. That they deny each and every allegation of paragraph 4 of the answer except insofar as said paragraph admits the allegations contained in paragraph 4 of the petition.

3. That they deny each and every allegation contained in paragraph 5 of the answer except insofar as said paragraph admits allegations contained in paragraph 5 of the petition.

[fols. 210-212] 4. That they deny each and every allegation contained in the answer by way of plea in bar of the relief sought in the petition except insofar as said allegations admit the allegations contained in the petition.

Wherefore the petitioners pray that the answer and plea in bar contained in said answer be dismissed and that the relief prayed for in the petition be granted.

Bennie Daniels, Lloyd Ray Daniels.

*Duly sworn to by Bennie Daniels and Lloyd Ray Daniels.  
Jurat omitted in printing.*

Certified copy mailed to Ralph Moody, Asst-Atty. Gen.,  
8/7/50.

[fol. 213]

[File endorsement omitted]

## IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISMISS—Filed December 18, 1950

The Respondent, J. P. Crawford, Warden of the Central Prison of the State of North Carolina, Raleigh, N. C., now moves the Court to dismiss the Petition for Writ of Habeas Corpus filed in this cause; to dismiss and discharge the Writ of Habeas Corpus heretofore issued in this cause; and that the Petitioners be remanded to the custody of Respondent for the purpose of making effective the sentence based upon the Judgment of the Superior Court of Pitt County, for the reasons and grounds following:

1. For that the record of the proceedings in the State Courts in the case of Petitioners, a certified copy of same being filed in this Court, discloses that the Supreme Court of North Carolina, the highest appellate court in the State of North Carolina, had jurisdiction to review upon appeal the matters and things about which Petitioners now complain and seek a review in the Federal District Court by Petition and Writ of Habeas Corpus; that Petitioners failed to comply with the conditions upon which an appeal is granted by the Criminal Code of Procedure of the State of North Carolina and thereby failed to exhaust their remedy of appeal provided by the State and cannot now have a review of these same questions by Writ of Habeas Corpus as a substitute for an appeal.

2. For that the record of Petitioners' trial in the Superior Court of Pitt County, N. C., does not show or disclose any exceptional circumstances of peculiar urgency in connection with said trial that require the intervention of a Federal Court by Habeas Corpus; that said record as well [fol. 214] as said Petition of Writ of Habeas Corpus discloses that there has not been any gross violation of constitutional rights of Petitioners such as to deny the substance of a fair trial or that Petitioners were prevented from raising any questions for their defense on said trial because of ignorance, duress or other reason for which Peti-

tioners should not be held responsible; that Petitioners have not exhausted their remedies under state law.

3. For that the Petition discloses that Petitioners seek a review by Writ of Habeas Corpus of the issue as to whether or not members of Petitioners' race were unconstitutionally excluded from service on Grand and Petit juries in Pitt County, North Carolina, and such question or issue having been raised, tried and heard in the State Court and decided adversely to Petitioners, the same cannot now be reviewed by Writ of Habeas Corpus; that said issue or question of alleged jury discrimination could have been reviewed by the Supreme Court of North Carolina on appeal and Petitioners having failed to perfect their appeal to said appellate court, cannot now have said questions or issue reviewed by the Federal Court on Writ of Habeas Corpus; that if there was error in the decision of the State Court on the question or issue of jury discrimination the same was an irregularity and not a jurisdictional defect and cannot now be reviewed by Writ of Habeas Corpus.

4. For that the Petition discloses that the Petitioners seek a review of the question as to whether or not certain confessions made by the Petitioners were voluntary and whether or not said confessions were secured from Petitioners by methods contrary to the Fourteenth Amendment of the Federal Constitution; that all of said questions relating to said confessions were heard and reviewed by the trial Court, which decided adversely to Petitioners and admitted said confessions in evidence, and whether said ruling of the trial court is correct or not the same is not a jurisdictional defect, does not deprive and did not deprive the trial court of jurisdiction and cannot now be reviewed [fol. 215] by Writ of Habeas Corpus; that all questions and issues relating to said confessions could have been reviewed by the Supreme Court of North Carolina on appeal, said Court being the highest appellate court in the State, and Petitioners having failed to perfect their said appeal cannot now have said questions reviewed on Writ of Habeas Corpus.

5. For that the constitutionality and legal validity of the procedure of the State of North Carolina for the determination of the admissibility of confessions, as well as

the question as to whether or not said procedure violates Petitioners' rights of jury trial cannot be reviewed upon Writ of Habeas Corpus; that said questions could have been reviewed by the Supreme Court of North Carolina had the Petitioners seen fit the perfect their appeal to said appellate court, and having not perfected said appeal, said questions cannot now be reviewed by Writ of Habeas Corpus.

6. For that all questions as to the instructions of the Court to the jury; and all questions as to the instructions of the Court to the jury as to how the jury should consider said confessions and as to whether said confessions were voluntary or not, cannot be reviewed by Writ of Habeas Corpus.

R. Brookes Peters, Jr., General Counsel, State Highway & Public Works Commission; Harry McMullan, Attorney General of North Carolina; Ralph Moody, Assistant Attorney General of North Carolina; E. O. Brogden, Attorney, State Highway & Public Works Commission.

[fol. 216] IN UNITED STATES DISTRICT COURT

[Title omitted]

RETURN TO WRIT—Filed December 18, 1950

To His Honor Don Gilliam, United States District Judge Presiding Over the District Court of the United States for the Eastern District of North Carolina, Raleigh Division:

The respondent, J. P. Crawford, Warden of the Central Prison of the State of North Carolina, Raleigh, N. C., respectfully makes the following return to the Writ of Habeas Corpus issued to him on the 8th day of July, 1950.

1. That in his official capacity he has the said Bennie Daniels and Lloyd Ray Daniels in custody at Central Prison, Raleigh, North Carolina.
2. That the authority under which he has the said Bennie Daniels and Lloyd Ray Daniels in custody and imprison-



ment is by virtue and authority of Judgments from the May 30th Term, 1949, of the Pitt County Superior Court, photostatic copies of which are hereto attached and by reference made a part of this return. That certified copies of said Judgments will be produced and exhibited to Your Honor upon the return of this writ.

3. That the answer heretofore filed by the undersigned respondent in opposition to the petition for Writ of Habeas Corpus, filed in this proceeding and now pending before this court, is hereby referred to and made a part of this return for the purpose of showing the authority by which the aforesaid Bennie Daniels and Lloyd Ray Daniels are being held in custody and imprisonment.

4. That upon the return of said writ at the time and place therein set out or designated by Your Honor, he now has before Your Honor the bodies of the said Bennie Daniels and Lloyd Ray Daniels as by said Writ commanded. [fol 217] And having made a full return of said Writ, he now stands ready and willing to receive, abide by, and perform such orders as your Honor may make in the premises.

J. P. Crawford, Warden of the Central Prison of the State of North Carolina.

*Duly sworn to by J. P. Crawford. Jurat omitted in printing.*

[fol. 218] IN THE SUPERIOR COURT, MAY 30TH TERM 1949

NORTH CAROLINA, PITT COUNTY

STATE

VS.

BENNIE DANIELS

JUDGMENT

The prisoner, Bennie Daniels, having been convicted of murder in the first degree by verdict of the Jury duly returned at this term of the Superior Court of Pitt County, North Carolina,

It Is, Therefore, Ordered and Adjudged that the said Bennie Daniels be, and he is hereby sentenced to death by asphyxiation, and the Sheriff of Pitt County, North Carolina, in whose custody the said defendant now is, forthwith convey such prisoner, Bennie Daniels, to the State Penitentiary at Raleigh, North Carolina, and deliver said prisoner, Bennie Daniels, to the warden of the State's Penitentiary, who, the said Warden, on Friday the 15th day of July 1949, shall cause the said prisoner, Bennie Daniels, to inhale lethal gas of sufficient quantity and volume to cause the death of said prisoner, Bennie Daniels, which administration and inhalation of such lethal gas shall be continued until life is extinguished and the said prisoner, Bennie Daniels, is dead.

May God have mercy upon his soul.

Clauson L. Williams, Judge Presiding.

[fol. 219] IN THE SUPERIOR COURT, MAY 30TH TERM 1949

NORTH CAROLINA, PITT COUNTY

STATE

VS.

LLOYD RAY DANIELS

JUDGMENT

The prisoner, Lloyd Ray Daniels, having been convicted of murder in the first degree by verdict of the Jury duly returned at this term of the Superior Court of Pitt County, North Carolina,

It Is, Therefore, Ordered and Adjudged that the said Lloyd Ray Daniels be, and he is hereby sentenced to death by asphyxiation, and the Sheriff of Pitt County, North Carolina, in whose custody the said defendant now is, forthwith convey such prisoner, Lloyd Ray Daniels, to the State Penitentiary at Raleigh, North Carolina, and deliver said prisoner, Lloyd Ray Daniels, to the Warden of the State's Penitentiary, who, the said Warden, on Friday the 15th day of July 1949, shall cause the said prisoner,

Lloyd Ray Daniels, to inhale lethal gas of sufficient quantity and volume to cause the death of said prisoner, Lloyd Ray Daniels, which administration and inhalation of such lethal gas shall be continued until life is extinguished and the said prisoner, Lloyd Ray Daniels, is dead.

May God have mercy upon his soul.

Claudson L. Williams, Judge Presiding.

[fol. 220]

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS—Filed  
February 28, 1951

To the District Court of the United States for the Eastern  
District of North Carolina:

The Supplemental Petition of Bennie Daniels and Lloyd Ray Daniels respectfully shows:

1. They repeat and reallege and incorporate as part hereof the facts recited in paragraphs "1" and "2", pages 1 to 10, of their Petition to this Honorable Court for a Writ of Habeas Corpus.

2. Upon their Petition for a Writ of Certiorari to the United States Supreme Court, petitioners assigned as error, as a deprivation of their rights to the equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution, the refusal of the Supreme Court of North Carolina to review their appeal on the merits.

[fol. 221] 3. In addition to the facts recited in paragraphs "1" and "2" of their petition to this Honorable Court, facts exist demonstrating that the refusal by the North Carolina Supreme Court to entertain petitioners' appeal was an arbitrary and unreasonable deprivation of petitioners' rights under the laws of the State of North Carolina to appeal from a conviction. On June 6, 1949 a judgment of death by asphyxiation was rendered against

the petitioners on a verdict of guilty of first degree murder. Thereupon petitioners noted an appeal to the Supreme Court of North Carolina and were allowed 60 days in which to make out and serve a statement of the case on appeal upon the Solicitor for the Fifth Judicial District of the State of North Carolina. Approximately one month passed before counsel for petitioners received the first volume of the record of the criminal trial, which first volume consisted of approximately 300 pages; and counsel for petitioners did not receive the full and complete record in the criminal cause from the court stenographer until approximately 50 or 51 days after June 6. Despite the delay in the receipt of the record in the criminal cause, counsel for petitioners made all diligent efforts to prepare the statement of the case on appeal within the time prescribed so that although the last volume of the record was received about only one week prior to the expiration of the time for service of the statement of the case on appeal counsel for petitioners, by diligent and painstaking efforts, completed the preparation of the said statement on the afternoon of Thursday, August 4, which was one day before the deadline. On Friday, April 5, the last day on which service of the statement of the case on appeal could be made, Herman L. Taylor, Esq., one of the attorneys for petitioners, telephoned the office of the Honorable William J. Bundy, Solicitor, in Greenville, North Carolina, from Fayetteville, North Carolina, where Mr. Taylor was engaged in another matter, and by that telephone conversation Mr. Taylor attempted to communicate with Mr. Bundy for the purpose of serving the case on appeal. Mr. Taylor was informed by the telephone operator that the Solicitor was not in his office and Mr. Taylor thereupon spoke to Mrs. M. W. Fields, the Solicitor's secretary, and she informed Mr. Taylor that the Solicitor was not in his office or at his home and that he was out of town and could not be reached until Monday morning, August 8, when he would return to his office. Unable to contact the Solicitor in person, Mr. Taylor, on Saturday morning, August 6, 1949, left a copy of the statement of the case on appeal at the Office of the Solicitor with the latter's secretary, and Mr. Taylor received in return a signed



statement of acceptance of the statement by the said Mrs. M. W. Fields, on behalf of the Solicitor. 45 days thereafter the Solicitor served and filed 132 exceptions to the case on appeal, thereby indicating that he was in no wise prejudiced or injured by the one-day delay in the service of the case on appeal. Nevertheless the Supreme Court of the State of North Carolina, on the basis of the foregoing [fol. 223] factual situation, has refused and continues to refuse to entertain the appeal of the petitioners.

4. Petitioners are informed by their attorneys and they believe that under the decisions of the Supreme Court of the United States an arbitrary and unreasonable interference with or deprivation of the right to appeal from a conviction constitutes a violation of the constitutional guarantee of the equal protection of the laws. Upon the basis of the applicable rule of law herein referred to and in view of the facts herein recited, petitioners are unjustly and unlawfully detained and imprisoned.

5. The petitioners have exhausted all of their State remedies, including a Petition for Writ of Certiorari to the United States Supreme Court, with respect to the foregoing error by the Courts of the State of North Carolina and petitioners are therefore remediless save in this Court and by this procedure.

6. There is presently pending in this Court the petitioners' application for Writ of Habeas Corpus but no previous application for said Writ has been made by petitioners upon the grounds herein asserted.

[fol. 224] Wherefore, the premises considered, the petitioners pray:

(1) That a Writ of Habeas Corpus directed to the said respondent, J. P. Crawford, may issue in their behalf so that petitioners may be brought forthwith before this Court;

(2) That said respondent be required to appear and answer the allegations of this petition;

(3) That following a full and complete hearing, this Court relieve petitioners of their unlawful detention, imprisonment and sentence of death;

(4) And for such other and further relief as to this Court may seem just and proper under the circumstances.

Bennie Daniels, Lloyd Ray Daniels.

[fols. 225-245] *Duly sworn to by Bennie Daniels and Lloyd Ray Daniels. Jurat omitted in printing.*

[fol. 246]

[File endorsement omitted].

IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF RESPONDENT TO SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS--Filed May 17, 1951

The Respondent, J. P. Crawford, Warden of the Central Prison of the State of North Carolina, Raleigh, North Carolina, by B. M. Poole, Assistant Warden, answering the Supplemental Petition for Writ of Habeas Corpus herein filed, for his Answer says:

1. The allegations of Paragraph 1, as well as the allegations contained in Paragraphs 1 and 2 of the former Petition filed in this case, are untrue and are, therefore, denied.

2. Answering the allegations contained in Paragraph 2 of the Supplemental Petition, the Respondent alleges that the Petition for Writ of Certiorari to the Supreme Court of the United States is a part of the record in this cause, and Respondent alleges, therefore, that he is not required to answer this paragraph; that the Petitioners have not been deprived of any constitutional rights guaranteed by the Fourteenth Amendment to the United States Constitution by reason of the refusal of the Supreme Court of North Carolina to review their appeal on the merits; that the allegations of Paragraph 2 are untrue and are, therefore, denied.

3. The allegations of Paragraph 3 are untrue and are, therefore, denied; further answering said Paragraph 3, the [fol. 247] Respondent alleges that all of the matters and things alleged and referred to in said Paragraph 3 were

considered and passed upon by the Supreme Court of North Carolina, and Respondent, therefore, alleges that the decision of the Supreme Court of North Carolina is final and binding upon Petitioners and cannot now be invalidated or set aside by collateral attack in a habeas corpus proceeding.

4. The allegations of Paragraph 4 are untrue and are, therefore, denied.

5. The allegations of Paragraph 5 are untrue and are, therefore, denied.

6. Answering the allegations of Paragraph 6, it is admitted that there is now pending in this Court an application for a Writ of Habeas Corpus, and except as herein admitted, the allegations of Paragraph 6 are untrue and are, therefore, denied.

Wherefore, having fully answered, the Respondent prays the Court that the Petitioners take nothing by their Supplemental Petition for Writ of Habeas Corpus and that the same be dismissed.

• Harry McMullan, Attorney General of North Carolina; Ralph Moody, Assistant Attorney General; R. Brookes Peters, General Counsel for the State Highway & Public Works Commission; E. L. Brogden, Jr., Attorney and Member of Staff of State Highway & Public Works Commission, Attorneys for Respondent, J. P. Crawford, Warden of the Central Prison of the State of North Carolina, Raleigh, North Carolina.

5/17/51. Copy of answer handed to Herman Taylor, attorney for petitioner.

E. L. Brogden, Jr.

[fols. 248-265] *Duly sworn to by B. M. Poole. Jurat omitted in printing.*

[fol. 266]

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

—Filed July 12, 1951

Upon the evidence presented and the stipulations of counsel, the Court finds these facts:

1. Petitioners, inmates of the Central Prison of the State of North Carolina, instituted this proceeding against respondent, Warden of the aforesaid prison, under Chapter 153 of Title 28 of the United States Code by affidavit and motion to proceed *in forma pauperis* for a writ of habeas corpus.

2. Petitioners contend that they are unlawfully detained in prison and under sentence of death at the aforesaid prison.

3. Petitioners were convicted of the crime of murder in the first degree in the May 30, 1949 Term of the Superior Court of Pitt County, North Carolina, on June 6, 1949.

4. The indictment of petitioners was found by a Grand Jury sitting at the March Term, 1949, of Pitt County Superior Court, and upon its return, it having been made to appear to the Court that petitioners were without counsel and were financially unable to obtain counsel, the Court appointed two members of the Pitt County Bar of experience to represent them; upon arraignment at that term a plea of "not guilty" was entered and the trial of the case continued for the term; thereupon the presiding Judge committed the petitioners to the care and custody of the North Carolina State Hospital for the Insane, and to Dr. I. C. Long, an expert psychiatrist, for the purpose of study of their mental condition; when it appeared at the April Term, 1949, that the examination had not been completed, the cause [fol. 267] was continued upon motion of petitioner's counsel until the May Term, 1949, at which term it was tried; when it was made to appear to the Court at the call of the case at that term that petitioners had obtained counsel of their own choice, that is, Mr. Herman L. Taylor and Mr. C. J.



Gates, both now of counsel for them; appointed counsel were relieved of the assignment by the Court: prior to the call of the case the petitioners had been adjudged sane by the staff of the North Carolina Hospital for the Insane.

5. Upon the call of the case for trial, counsel for petitioners for the first time presented a motion to quash indictment and a challenge to the array of the trial jury, alleging systematic and purposeful exclusion of negroes from jury service solely on account of race; the trial court ruled that, under N. C. procedure, as the motion to quash was made after pleading to the indictment, it lay within the discretion of the Court whether it would allow or deny it; the Court then heard evidence from both the State and the petitioners and upon such evidence overruled both the motion to quash and the challenge to the array. The Court found the facts upon which his decision was based and these are set out in Volume 4 of the Transcript at pages 4 to 22.

6. During the progress of the trial the State offered the alleged confession of each petitioner; upon objection entered upon ground that such confessions were procured by coercion and, therefore, not voluntary, the trial Judge, in accord with N. C. practice and procedure, dismissed the jury and heard evidence from both the State and petitioners; upon this evidence the Court concluded that the confessions were made without offer of reward or hope of reward, freely and voluntarily, and that they were not extorted by either coercion, intimidation, or exhibition of any force or threat; having so found, the Court overruled the objections and the confessions were admitted as evidence for the jury's consideration. The Court's findings of facts [fol. 268] in regard to voluntariness of the confessions are set out in Volume 1 of Transcript at page 268.

7. The jury returned a verdict of guilty without recommendation of mercy and the petitioners were sentenced to death by asphyxiation, such sentence being mandatory under North Carolina law.

8. The petitioners, with the permission of the Court, appealed in forma pauperis to the Supreme Court of North Carolina, and by order of the Court petitioners were allowed 60 days from the date of the judgment in which to make out and serve a case on appeal upon the Solicitor of

the District, and the Solicitor was allowed 30 days after such service to serve his counter-case or exceptions; the judgment against the petitioners was entered on June 6, 1949, and the petitioners' case on appeal was served on the Solicitor on August 6, 1949, one day after the expiration of the 60 days allowed by the Court. Within the 30 days allowed, following service of the petitioners' case on appeal, the Solicitor filed a number of exceptions and also a motion to strike out the petitioners' case on appeal because not served within the sixty days allowed. When it became apparent that the case could not be docketed by September 27, 1949, which was the last day for docketing appeals from the Judicial District which embraces Pitt County, the petitioners, through their counsel, on September 27, 1949 filed a petition for writ of certiorari before the Supreme Court of North Carolina, praying that they be allowed to docket the appeal which they duly noted at the May 30, 1949 Term of the Superior Court of Pitt County, setting forth that as the case on appeal in their cause had not been settled they could not docket said case within the time required by the rules of the Court. Two days after the filing of this petition for writ of certiorari a hearing was held before the Superior Court Judge who tried the case, and ultimately on the 30th day of October, 1949, the Trial Judge entered an order allowing the motion of the Solicitor to strike defendant's statement of case on appeal. The petition for writ of certiorari was heard by the Supreme Court of North [fol. 269] Carolina at the Fall Term, 1949, and denied, and in the Court's opinion, 231 N. C., page 25, it is written:

"The gravamen of the present challenge to the validity of the trial is found in the two objections referred to in the petition: The alleged systematic exclusion of members of the negro race from the jury lists of Pitt County and the consequent absence of negroes from the panel which tried them; the admission in evidence of confessions of guilt by the accused, which confessions they contend were not voluntary but were procured by illegal means.

"Both these objections involve questions of invasion of constitutional rights which, in the instant case, can be presented only through matter extraneous to the record. Ordi-

narily in this situation, resort may be had to writs of error coram nobis.

"The writ of error coram nobis can only be granted in the court where the judgment was rendered.

"Since here the authority for the writ stems from the supervisory power given the Supreme Court in the section of the Constitution cited, it is necessary that an application be made to this Court for permission to apply for the writ to the Superior Court in which the case was tried. It is granted here only upon a 'prima facie showing of substantiality,' and it is observed in the Taylor case last cited, 'The ultimate merits of the petitioner's claim are not for us but for the trial court.'

"On consideration in the trial court, if the decision is adverse to the petitioners, the court will find the facts, and an appeal to this Court will lie as in other cases."

Following the denial of the petition for writ of certiorari, and following, no doubt, the suggestion contained in the opinion of the Court, the petitioners filed a petition with the Supreme Court of North Carolina for permission to apply to the Superior Court of Pitt County for a writ of error coram nobis; this petition was denied, the Supreme Court stating: "Their petition does not make a prima facie showing of substance, which is necessary to bring themselves within the purview of the writ.

[fol. 270] "The petition is insufficient to justify the Court in issuing the writ and instigating the incident procedure in the court below." *State v. Daniels*, 231 N. C. 341.

On March 1, 1950, the State of North Carolina, acting through its Attorney General, moved to docket and dismiss under Rule 17 of the Rules of the Supreme Court of North Carolina the appeal of petitioners from the death sentence, and this motion was allowed and the appeal dismissed. *State v. Daniels*, 231 N. C. 509. In the opinion in this case the Supreme Court of North Carolina said: "The defendants were tried and convicted at the May Term, 1949, of Pitt County Superior Court, on an indictment charging murder in the first degree, and were sentenced to death, from which judgment they gave notice of appeal. Not having served Case on Appeal in apt time they applied to this Court for a writ of certiorari for bringing up the Case on Appeal, which



was denied for want of merit. Subsequently they petitioned the Court for leave to file a writ of error coram nobis; and not having brought themselves within the purview of such a writ, petition was denied.

"No case on appeal having been filed in the office of the Clerk, the Attorney General has caused the record proper to be filed in this Court and moves that the case and record be docketed and the appeal dismissed under Rule 17 of the Rules of Practice of the Court.

"We have carefully examined the record filed in this case and find no error therein. For the causes stated the motion of the Attorney General is allowed; the judgment of the lower court is affirmed and the appeal is dismissed."

Thereupon, on the second day of March, 1950, execution of judgment was stayed by the Chief Justice of the Supreme Court of North Carolina, and the petitioners filed an application in the Supreme Court of the United States for a petition for writ of certiorari; a petition, brief, and other formal parts of a petition for writ of certiorari were filed in the Supreme Court of the United States, and on May 8, 1950 the [fol. 271] petition for writ of certiorari was denied. 339 U. S. 954.

The petitioners then petitioned the Supreme Court of North Carolina again for leave to file a petition in the Superior Court of Pitt County for a writ of error coram nobis, and incorporated in that petition matters that were presented to the Supreme Court of the United States in their petition to that Court for certiorari. This petition was denied on May 24, 1950. 232 N. C. 196. The N. C. Supreme Court stated: "On the face of the petition it appears that these are matters fully presented to the Court upon their trial and there passed upon."

Upon the denial of this petition and on the — day of —, 1950, the petitioners filed a petition for writ of habeas corpus in the Raleigh Division of this Court, and the Court issued the writ and stayed the execution of the judgments of the State Court.

9. The respondent, in compliance with the writ, brought the petitioners before the Court in Tarboro, North Carolina, in the Eastern District of North Carolina, on the 18th day



of December, 1950, to which date the return by order of the Court had been continued.

At the outset of the hearing upon the return, the respondent filed a motion to discharge the writ without the taking of evidence. The motion is filed with the court papers. The Court reserved its decision upon the motion and proceeded to the taking of evidence from both the petitioners and the respondent. The respondent entered a general objection to every question propounded by petitioners to their witnesses, and upon the overruling of each objection the respondent moved to strike out the answer to the question, and in each instance the motion was denied. In each instance where the respondent examined a witness in his behalf, the questions were propounded after the respondent had reiterated his [fol. 272] objection to all the evidence and reserved his exceptions.

10. At the conclusion of all the evidence, the respondent renewed his motion to dismiss and the motion was denied and overruled.

11. Petitioners are members of the negro race.

12. The facts found by the Trial Judge in the State Court, in respect to the composition of the jury, are supported by all the evidence, including that taken in the State Court, and these findings, which are set out in Volume 4 of the Transcript in the State Court, beginning on page 4 (Finding No. 4) and continuing through page 22 (Volume 4) are adopted as the findings of fact bearing on this question. And the Court specifically finds it was not shown that there was purposeful and systematic exclusion of negroes solely on account of race from either the jury box from which the indicting grand jury was drawn, or the jury panels from which the trial jury was selected.

13. The facts found by the Trial Judge in the State Court with respect to whether the offered confessions were voluntary or otherwise, which are set forth in Volume I of the transcript in the State Court on page 268, are adopted as findings in this respect. And the Court specifically finds that each of such confessions was made freely and voluntarily.

### Conclusions of Law

Upon these facts the Court concludes:

1. That the Court was in error in overruling the respondent's motion to dismiss as a matter of law before the introduction of evidence, and that such motion be and the same is now granted.

2. That the petitioners, who were held as prisoners awaiting execution under the judgment of the North Carolina Court, were not and are not "in custody in violation of the Constitution or laws or treaties of the United States" within the contemplation of Sec. 2241(c) (3) of Title 28, United States Code Annotated, and are not entitled to their release as prayed.

[fol. 273] 3. That the writ should be vacated, the petition dismissed, and the petitioners remanded to the respondent and the North Carolina authorities for further proceedings under the judgment of the State Court and in accordance with its provisions.

4. That an order to such effect be entered.

This the 12th day of July, 1951.

Don Gilliam, United States District Judge.

[fol. 274] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

LLOYD RAY DANIELS and BENNIE DANIELS, Petitioners

v.

JOSEPH P. CRAWFORD, Warden, Central Prison of the State of North Carolina, Raleigh, North Carolina, Respondent

MEMORANDUM OPINION—Filed July 12, 1951

The petitioners are negro boys who were 17 and 18 years of age, respectively, at the date of their trial in the Superior Court of Pitt County, North Carolina, which began on the 30th day of May, 1949. They were charged with first degree murder, and following a jury verdict of "Guilty" were sentenced to die.

Lloyd Ray was arrested without a warrant a day or two following the murder, by the Sheriff of Pitt County and certain other enforcement officers upon information justifying arrest without warrant under North Carolina Statute G. S. Sec. 15-41; he was taken to Williamston, the county seat of Martin County which adjoins Pitt County, for safekeeping, and during the automobile trip to the Martin County jail, a distance of less than fifty miles, he stated that he had participated in the murder, and related some of the details of how it was accomplished; Bennie was arrested without a warrant, also upon information justifying such action, by the Sheriff and other officers on the day following the arrest of Lloyd Ray, and he too was taken to Williamston for incarceration; on the way to Williamston Bennie admitted his participation in the murder, and later each petitioner signed a written confession which was introduced by the State at the trial.

The indictment was found by a Grand Jury sitting at the March Term, 1949, of Pitt County Superior Court, and upon its return, it having been made to appear that the petitioners were without counsel and that they were financially [fol. 275] unable to obtain counsel, the Court appointed two members of the Pitt County Bar, of experience and in good standing, to represent them. Upon arraignment at that Term the petitioners entered pleas of "Not guilty", and the cause was continued for the Term. Thereupon the Presiding Judge committed the petitioners to the care and custody of the North Carolina State Hospital for the Insane, at Goldsboro, and to I. C. Long, M. D., an expert psychiatrist, for the purpose of study of their mental condition. When at the next term, that is, April Term, 1949, it appeared that the examination at the State Hospital had not been completed, the cause was continued upon motion of petitioners' counsel until the May Term, 1949, at which term, as above indicated, it was tried. When it was made to appear to the presiding Judge at the April Term, 1949, that petitioners had obtained counsel of their own choice, that is, Mr. Herman L. Taylor and Mr. C. J. Gates, both now of counsel for them, the counsel earlier appointed by the Court were permitted to withdraw. Prior to the call of the case for trial, the petitioners had been found sane by the staff of the State Hospital at Goldsboro.

When the case was called for trial at the May Term, 1949, counsel for petitioners for the first time presented a motion to quash the indictment and a challenge to the array of the trial jury, alleging systematic and purposeful exclusion of negroes from jury service solely on account of race. The Court ruled that, as the motion to quash was made after pleading to the indictment, it lay within the discretion of the Court whether it would allow or deny the motion and the challenge. The Trial Judge then proceeded to hear evidence on this question from both the State and the petitioners, and upon such evidence overruled both the motion to quash and the challenge to the array.

During the progress of the trial the State offered the confessions of the petitioners. Upon objection made on the [fol. 276] ground that the confessions were procured by coercion and were, therefore, not voluntary, the Judge, in accord with the practice and procedure in North Carolina in such situations, heard evidence from the State and the petitioners in the absence of the jury, and concluded that the confessions were made without offer of reward or hope of reward, freely and voluntarily, that they were not extorted by either coercion, intimidation, or exhibition of any force or threat. Having so found, the Court overruled the objections and the confessions were admitted as evidence for the jury's consideration. The jury returned a verdict of guilty of murder in the first degree as to each petitioner, and as such verdict was not accompanied by a recommendation of life imprisonment—which by North Carolina Statute is permitted—the presiding Judge sentenced both petitioners to death, such being the mandatory punishment for murder in the first degree in the absence of a recommendation by the jury.

The petitioners, with the permission of the Court, appealed in forma pauperis to the Supreme Court of North Carolina, and by order of the Court petitioners were allowed sixty days from the date of the judgment in which to make out and serve a case on appeal upon the Solicitor of the District, and the Solicitor was allowed thirty days after such service to serve his counter case or exceptions; the judgment against the petitioners was entered on June 6, 1949, and the petitioners' case on appeal was served on the Solicitor on



August 6, 1949, one day after the expiration of the sixty days allowed by the Court. Within the thirty days allowed, following service of the petitioners' case on appeal, the Solicitor filed a number of exceptions and also a motion to strike out the petitioners' case on appeal, because not served within the sixty days allowed. When it became apparent that the case could not be docketed by September 27, 1949, which was the last day for docketing appeals from the [fol. 277] Judicial District which embraces Pitt County, the petitioners, through their counsel, on September 27, 1949, filed a petition for writ of certiorari before the Supreme Court of North Carolina, praying that they be allowed to docket the appeal which they duly noted at the May 30, 1949 Term of the Superior Court of Pitt County, setting forth that as the case on appeal in their cause had not been settled they could not docket said case within the time required by the rules of the Court. Two days after the filing of this petition for writ of certiorari a hearing was held before the Superior Court Judge who tried the case and ultimately on the 30th day of October, 1949, the Trial Judge entered an order allowing the motion of the Solicitor to strike defendants' statement of case on appeal. The petition for writ of certiorari was heard by the Supreme Court of North Carolina at the Fall Term, 1949, and denied, and in the Court's opinion, 231 N.C., page 25, it is written: "The gravamen of the present challenge to the validity of the trial is found in the two objections referred to in the petition: the alleged systematic exclusion of members of the negro race from the jury lists of Pitt County and the consequent absence of negroes from the panel which tried them; the admission in evidence of confessions of guilt by the accused, which confessions they contend were not voluntary but were procured by illegal means.

"Both these objections involve questions of invasion of constitutional rights which, in the instant case, can be presented only through matter extraneous to the record. Ordinarily, in this situation resort may be had to writs of error coram nobis . . .

"The writ of error coram nobis can only be granted in the court where the judgment was rendered . . .

"Since here the authority for the writ stems from the

supervisory power given the Supreme Court in the section [fol. 278] of the Constitution cited, it is necessary that an application be made to this Court for permission to apply for the writ to the Superior Court in which the case was tried. It is granted here only upon a 'prima facie showing of substantiality', and it is observed in the Taylor case last cited: 'The ultimate merits of the petitioner's claim are not for us but for the trial court'.

"On consideration in the trial court, if the decision is adverse to the petitioners, the court will find the facts, and an appeal to this Court will lie as in other cases."

Following the denial of the petition for writ of certiorari, and following, no doubt, the suggestion contained in the opinion of the Court, the petitioners filed a petition with the Supreme Court of North Carolina for permission to apply to the Superior Court of Pitt County for a writ of error coram nobis; this petition was denied, the Supreme Court stating: "Their petition does not make a prima facie showing of substance, which is necessary to bring themselves within the purview of the writ."

"The petition is insufficient to justify the Court in issuing the writ and instigating the incident procedure in the court below." *State v. Daniels*, 231 N. C., 341.

On March 1, 1950, the State of North Carolina, acting through its Attorney General, moved to docket and dismiss, under Rule 17 of the Rules of the Supreme Court of North Carolina, the appeal of petitioners from the death sentence, and this motion was allowed and the appeal dismissed. *State v. Daniels*, 231 N. C. 509. In the opinion in this case the Supreme Court of North Carolina said: "The defendants were tried and convicted at the May Term, 1949, of Pitt County Superior Court, on an indictment charging murder in the first degree, and were sentenced to death, from which judgment they gave notice of appeal. Not having served Case on Appeal in apt time they applied to this Court for a writ of certiorari for bringing up the Case on [fol. 279] Appeal, which was denied for want of merit. Subsequently they petitioned the Court for leave to file a writ of error coram nobis; and not having brought themselves within the purview of such a writ, petition was denied."

"No case on appeal having been filed in the office of the Clerk, the Attorney General has caused the record proper to be filed in this Court and moves that the case and record be docketed and the appeal dismissed under Rule 17 of the Rules of Practice of the Court.

"We have carefully examined the record filed in this case and find no error therein. For the causes stated, the motion of the Attorney General is allowed; the judgment of the lower court is affirmed and the appeal is dismissed."

Thereupon, on the second day of March, 1950, execution of judgment was stayed by the Chief Justice of the Supreme Court of North Carolina, and the petitioners filed an application in the Supreme Court of the United States for a petition for writ of certiorari; a petition, brief, and other formal parts of a petition for writ of certiorari were filed in the Supreme Court of the United States, and on May 8, 1950, the petition for writ of certiorari was denied. 339 U. S., 954.

The petitioners then petitioned the Supreme Court of North Carolina again for leave to file a petition in the Superior Court of Pitt County for a writ of error coram nobis, and incorporated in that petition matters that were presented to the Supreme Court of the United States in their petition to that Court for certiorari. This petition was denied on May 24, 1950. 232 N. C. 196. The North Carolina Supreme Court stated: "On the face of the petition it appears that these are matters fully presented to the Court upon their trial and there passed upon."

Upon the denial of this petition and on the 2nd day of June, 1950, the petitioners filed a petition for writ of habeas [fol. 280] corpus in this Court, and the Court issued the writ and stayed the execution of the judgments of the State Court pending a hearing.

At the outset of the hearing upon the return to the writ, the respondent filed a motion to discharge the writ without the taking of evidence. The motion is filed with the court papers. The Court reserved its decision upon the motion and proceeded to the taking of evidence from both the petitioners and the respondent. The respondent entered a general objection to every question propounded by petitioners to their witnesses, and upon the overruling of each objection the respondent moved to strike out the answer

to the question, and in each instance the motion was denied. In each instance where the respondent examined a witness in his behalf, the questions were propounded after the respondent had reiterated his objection to all the evidence and reserved his exceptions.

Upon the evidence introduced, the Court has found certain facts separately and these findings are filed simultaneously herewith.

At the conclusion of all the evidence, the respondent renewed his motion to dismiss and the motion was denied and overruled.

Further study following the presentation of briefs and oral argument has convinced me that the decision overruling the respondent's motion to dismiss the writ as a matter of law upon the procedural history was erroneous, and that the motion should have been granted. It would be a stupendous undertaking to review the numerous decisions on this question and I do not feel called upon to do so. These decisions are reviewed in a number of cases, among them *Smith v. United States*, decided by the U. S. Court of Appeals of the District of Columbia on December 7, 1950, and reported in 187 Fed. (2) at page 192.

[fol. 281] The general principles involved in cases of this nature where habeas corpus is resorted to by one under judgment of a State Court are discussed by Chief Judge Parker in *Sanderlin v. Smith*, 138 Fed. (2) p. 729, where these general observations are set out: (p. 730) "The writ of habeas corpus may not be used in such cases as an appeal or writ of error to review proceedings in the State Court"; p. 731) "The judgment of the State Court is ordinarily *res adjudicata*, not only of those issues which were raised and determined, but also of those which might have been raised"; (p. 731) "Ordinarily, adjudications made by the State Courts in connection with applications made to them will be binding on the federal courts"; (p. 732) "The only question which we can consider with respect to these matters is, not whether error was committed under State practice, but whether there was a denial of due process as guaranteed by the federal Constitution"; (p. 732) "As said in the case last cited (*Buchalter v. New York*, 319 U. S., p. 427): 'The due process clause of the 14th



Amendment requires that action by a State through any of its agencies must be consistent with the fundamental principles of liberty and justice which lie at the base of our civil and political institutions, which are not infrequently designated as the law of the land. Where the requirement has been disregarded in a criminal trial in a State Court, this Court has not hesitated to exercise its discretion to enforce the constitutional guarantee. But the Amendment does not draw to itself the provisions of State constitutions and State laws. It leaves the State free to enforce their criminal law doctrines as they deem appropriate; and does not permit a party to bring to the test of a decision in the Court every ruling made in the course of a trial in a State Court. . . . As already stated, the due process clause of the 14th Amendment does not enable us to review errors of [fol. 282] State law however material under 'State law'."

Other cases which seem to uphold the view that the decision of the State Court is binding on this Court are: *Andrews v. Swartz*, 156 U. S. 272; *Morton v. Henderson*, 123 Fed. (2) 48; *Hawk v. Olsen*, 130 Fed. (2) 910. There are others.

Maybe, in spite of the decisions, it is true, as petitioners contend, that where it appears clearly that there has been such a gross violation of a defendant's constitutional rights as amounts to a denial of even the substance of a fair trial, the United States Court will strike down the trial and judgment in the State Court. But such a case is not presented. The petitioners, though young and illiterate as their counsel points out, were ably and adequately represented, first by experienced counsel named by the Court, and later by counsel of their own selection; before their trial the State Court took the precaution of having them examined by competent psychiatrists who found them sane; the identical questions which petitioners wish passed upon now were passed upon in the State Court, not in a mere pro forma manner but painstakingly and carefully by the Trial Judge who heard practically the same witnesses and the same evidence presented to this Court, and upon such evidence concluded the questions against the petitioners; an appeal was taken to the Supreme Court of the State; though the petitioners failed to comply with the law in serving the case on appeal and for this reason the case on

appeal was stricken, the Supreme Court of North Carolina, as it always does in a death case, examined the record and found no error. The Court so stated in the opinion dismissing the appeal. The record which was before that Court contained all the evidence and all the rulings pertinent to the two questions raised in the State Court and raised again here. The record also contained the instructions of the Trial Judge with respect to the confessions, about which petitioners now complain. Petitioners applied for writ of certiorari to the United States Supreme Court, [fol. 283] and this was denied; other procedural steps were taken in the State Court, all of which are detailed in the findings of fact. It is difficult to believe that any impartial person would conclude in the light of the procedural history of this case that it clearly appears that petitioners were denied the substance of a fair trial.

Judge Williams, upon the evidence before him, found that petitioners had not been discriminated against in the composition of the jury, and the Supreme Court of North Carolina found no error in this ruling. This latter circumstance should have great weight in view of the consistent holding of that Court, beginning with the decision in *State v. Peoples*, 131 N. C., p. 784—decided more than forty years ago—" . . . that the intentional, arbitrary and systematic exclusion of any portion of the population from jury service, grand or petit, on account of race, color, creed or national origin, is at variance with the common law and cannot stand." And that Court has stood ready to reverse a contrary ruling of the trial Court when the evidence produced clearly showed that the trial Court's conclusion was not supported by the evidence. The petitioners say, though, that their appeal was not considered by the Supreme Court, but was dismissed because their counsel were one day late in serving their case on appeal. True, the appeal was dismissed, but we may believe the Court was speaking the truth in saying in the per curiam opinion: "We have carefully examined the record filed in this case and find no error therein . . . the judgment of the lower Court is affirmed and the appeal dismissed".

It is true that there was evidence presented which permitted an inference that the jury box contained a smaller

percentage of educationally qualified negroes than that of the whites, but there was no basis for a comparison of the [fol. 284] two races from the standpoint of moral character, which under North Carolina law is also an essential requirement for those deemed qualified to serve as jurors. While under the evidence an inference of discrimination might be drawn, such showing is not sufficient to justify declaring the trial in the State Court void. As stated by the North Carolina Supreme Court in *State v. Brown*, 233 N. C., p. 202: "It rests only in imagination or conjecture, the defendant must show prejudice other than guess or surmise before any relief could be granted on any such gossamer or attenuated ground". Charging exclusion of negroes on account of race does not make it so. The burden rests upon the petitioners to prove it and in the absence of proof of corruption the law presumes that the officials to whom the responsibility is committed faithfully performed their duty. *State v. Brown, Supra*. Every official who had a hand in composing the jury list stated under oath that no person's name was excluded because of race, and the other evidence does not show circumstantially that they testified falsely. But the petitioners complain because, as they assert, the evidence shows that the names were chosen solely from the voting lists rather than from tax lists and other sources. In absence of any clear proof that such was done as a part of a scheme to exclude negroes on account of race, they are entitled to no relief on this account, even if the fact is as they claim. In the *Brown* case, cited above, the argument was advanced that the jury was illegally composed because the names were taken solely from the tax lists while the applicable statute provided for use of such lists and the inclusion of "names who do not appear upon the tax lists, who are residents of the County and over twenty-one years of age". The Supreme Court of North Carolina rejected the contention with this comment: "... it is thoroughly settled by our decisions that the provisions of the statute now in focus are directory [fol. 285] and not mandatory, in the absence of proof of bad faith or corruption on the part of the officers charged with the duty of selecting the jury list". So it seems that even though the voting lists were exclusively used in obtaining the names for the jury box, this alone would not constitute

failure to observe the statute and, therefore, discrimination in the selection of the names. Proof is required. Both the North Carolina trial Court and the North Carolina Supreme Court held that there was no proof of discrimination, and this conclusion is in accord with my own.

There is even less basis for the petitioners' position with respect to the confessions. It seems rather clear that this position is not available to the petitioners in this proceeding. Numerous cases, in addition to those cited above, hold that a habeas corpus proceeding may not be used to correct errors committed in the trial Court which may be reviewed on appeal. The authorities cited by petitioners do not persuade me to a contrary view. But even if the position is available the petitioners failed to substantiate it. In their brief, counsel state: "... petitioner contends, and, of course, the police officers denied, that he was put in extreme fear of bodily harm". The matter might as well be phrased: The State contended and, of course, the defendants denied, that the confessions were freely and voluntarily made to the officers. Each of the participating officers stated that there was no force or coercion used, no threat made, no hope of reward suggested, and that each of the petitioners made his confession voluntarily. It may be that on occasion an officer will extort a confession and then color his testimony to make the contrary appear; no doubt such thing has happened; on the other hand, it is well known that many a defendant has voluntarily confessed and later, [fol. 286] when face to face with the consequences, has claimed that the confession was unlawfully obtained. Besides, the testimony of the officers is borne out by the other evidence, notably the testimony of the witness who talked with the petitioners while they were under observation at the State Hospital for the Insane, where they obviously were removed from any possible fear of the officers and were in a friendly and reassuring atmosphere. In addition, the confessions were made on several other occasions and never denied until petitioners were called at the trial in an effort to prove their point and escape punishment. Other evidence in the case very strongly corroborated the State's charges and the integrity of the confessions.

The position is taken that the confessions were involun-



tary because the petitioners were taken and held a few days without warrant. Under North Carolina law the officers had a legal right to arrest without warrant. As pointed out by petitioners' counsel, the crime was "a particularly atrocious one and aroused much feeling in the community". The officers knew that a felony had been committed, and their information was sufficient to afford reasonable ground for the belief that the petitioners committed it. It was natural for them to believe that the suspects might escape unless immediately arrested. Under North Carolina General Statutes, Sec. 15-41, the officers were not required to obtain warrants, as this formality in such situations is dispensed with in the interest of the effective enforcement of the law. It does not appear that the petitioners were held an undue length of time before the issuance of warrants, but even so, each petitioner made a confession before he was even put in prison and within minutes after being arrested. Neither the length of time held without warrants, nor the treatment they received, [fol. 287], brought about the confessions; they were immediately and voluntarily given, and reiterated several times thereafter. The trial Judge, and the Supreme Court of North Carolina had no doubt concerning the lawfulness and competency of the confessions, and neither have I.

Another contention of petitioners is that the trial Judge incorrectly charged the jury as to the consideration to be given the confessions which were admitted over petitioners' objections. The handling of the master was in accord with North Carolina procedure, and the Supreme Court of North Carolina found no error. In addition, I am of the opinion that the correctness of the charge may not be reviewed in this proceeding.

Lastly, the petitioners lay considerable stress on the fact that, as they insist, the trial was not reviewed because the case on appeal was served one day late, and they take the position, in effect, that with two lives at stake this formality should have been overlooked. There is nothing to the position. In the first place, the Supreme Court reviewed the record and found no error. But even if this were not true, the petitioners cannot complain. In *Andrews v. Swartz*, 156 U. S., p. 275, the Supreme Court, quoting from

*McKane v. Durston*, 153 U. S., p. 687, said: "An appeal from a judgment of conviction is not a matter of right, independently of constitutional or statutory provisions allowing such appeal . . . It is wholly within the discretion of the State to allow or not to allow such a review . . . and whether an appeal should be allowed, and if so, under what circumstances or on what conditions are matters for each State to determine for itself."

My conclusion, therefore, is that the petitioners have had a perfectly fair and impartial trial, in accordance with law and constitutional provisions, that the writ should be vacated because not available to petitioners on the procedural history, and if so, the petitioners are not entitled [fol. 288] to discharge because they have failed to substantiate the charges made.

An order vacating the writ and dismissing the petition has been entered

This July 12, 1951.

Don Gilliam, United States District Judge.

Addenda: Two other cases decided by our Court of Circuit Appeals seem also to support the conclusion reached above. These are: *Stonebreaker v. Smith*, 163 Fed. 2nd, 498; and *Jerry Adkins v. W. Frank Smith*, decided April 10, 1951.

Don Gilliam, United States District Judge.

[fols. 289-292] [File endorsement omitted]

[Title omitted]

ORDER—Filed July 14, 1951

Upon the facts found by the Court and filed separately, and in accordance with the conclusions of law arising thereon, It Is Ordered and Decreed:

1. That the writ of habeas corpus heretofore issued be vacated, and the petition dismissed.
2. That the petitioners be and they are hereby remanded to the respondent and the North Carolina authorities for

further proceedings under the judgment of the Superior Court of North Carolina, and in accordance with its provisions.

3. That the stay of execution under the State Court judgment heretofore entered be and it is hereby vacated.

4. That a certified copy of this Order under the seal of the Court be served by the United States Marshal, or one of his deputies, upon the respondent as his authority for proceeding under the judgment of the State Court.

This 13th day of July, 1951.

Don Gilliam, United States District Judge.

Received this writ 7/16/51 at Raleigh, N. C. & executed it on 7/16/51 at N. C. Central Prison, Raleigh, N. C. by serv. & delivering a copy to J. B. Dellinger acting Warden in the absence of Joseph P. Crawford.

Ford S. Worthy, U.S. Marshal. By L. L. Jackson, Deputy.

Fee 2.00.

[fols. 293-296] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

CERTIFICATE OF PROBABLE CAUSE—Filed July 18, 1951

This matter coming on before the undersigned upon application by Bennie Daniels and Lloyd Ray Daniels, petitioners in the above entitled matter, through their counsel, for a Certificate of Probable Cause in the above entitled matter; and it appearing to the Court;

1. That on the 2nd day of June, 1950, petitioners, filed a petition for writ of habeas corpus in the said matter, and pursuant to return made by respondent therein, said writ was issued.

2. That on the 13th day of July, 1951, the Court issued an order vacating and discharging said writ, for that the Court

is of the opinion, as contended by counsel for respondent, that the Court, as a matter of law, has no jurisdiction to entertain and pass upon the merits of said matter.

3. That said matter, as well as the discharge and vacation of the writ heretofore issued, involves a serious question of law, which this Court, despite the diligence of counsel for petitioners, counsel for respondent and the Court, cannot, upon the state of the law, satisfactorily and conclusively resolve.

4. That the instant matter involves the lives of the petitioners, and that this fact, together with the serious question of law involved, as hereinbefore stated, warrants and justifies an allowance to petitioners of an appeal from the judgment entered by this Court.

It is therefore ordered that petitioners are hereby allowed to appeal their cause to the United States Court of Appeals for the Fourth Circuit, in conformity to the rules of procedure in such cases made and provided, and that the instant certificate shall serve as the Certificate of Probable Cause required by law.

This 17th day of July, 1951.

Don Gilliam, Judge, United States District Court,  
Eastern District of North Carolina.

[fol. 297] [Stamp:] Filed Dec. 21, 1950. A. Hand  
James, Clerk, U. S. District Court. E. Dist. No. Car.

RESPONDENT'S EXHIBIT 2-A

STATE HOSPITAL AT GOLDSBORO

Clinical Notes

Name: Lloyd Ray Daniels. Register Number 21222

May 13, 1949.

*Interview with a white man from Greenville, N. C.: who states that he has known patient for the past eight or ten years.*

He states that patient was never formerly in trouble, having always been a good natured, law-abiding, hard



working youngster. He is the only boy of thirteen children. He states that the home "is a low grade type", his mother having married one man who apparently left her. Four men are the fathers of her thirteen children, eleven of whom have illegitimate children themselves.

He states that patient never cared for attending school and perhaps has very little education. He added, however, that patient was alert and willing to learn; that he could remove the parts of a plow and place them back without any difficulties, and that he could readily carry out instructions when they were given to him. He claims that patient was ill with a seizure or something approximately two years ago when he appeared listless and was seemingly unconscious, a taxi driver having carried him home from a show in Greenville, N. C.

This white man, after talking with patient at the Criminal Building, ask- that Interviewer sit in and have patient repeat what he had just heard him say. Patient calmly related the following:

He claims that he got up with Bennie Daniels and Bennie's brother on Saturday afternoon before the murder that night. They drank one pint of liquor and later drank some beer. Lloyd Ray knowing that he only had twenty-five cents in his pocket, advised these boys that he could not go with them. Bennie advised him to leave everything to him, advising that he would look after all the incidentals. It seems that patient repeatedly attempted to explain that he could not go with them but after their insisting he always did so. Bennie bought a new knife before their getting in a taxi near the bus station. They rode approximately six miles from Greenville to a side road near which were three tobacco barns. The taxi was ordered to circle around and apparently come back on the road. Lloyd Ray sat to the right of the driver, Bennie being directly behind him in the back seat. After getting off the road, near the tobacco barns, Bennie surrounded the driver with out-stretched arms, the sharp knife facing his throat. Lloyd Ray, realizing what was happening, again stated that he did not wish to follow Bennie. The driver's throat was apparently cut before they got him on the left side of the car, where Lloyd Ray was knocked down by the driver.

[fol. 298] Lloyd Ray states that he started to run but was immediately tripped by Bennie, who explained what had happened, advising that patient was then as guilty as he. Neither one could deny what they had already done.

Lloyd Ray admits that he used tobacco sticks on the driver's body. He claims that it was then around eleven o'clock. They reached his mother's home about twelve o'clock midnight. They apparently remained there until two A. M., when it was claimed that they went back to the tobacco barns, then returned home where they slept until early morning when they got up and played marbles in the yard until ten A. M.

Lloyd Ray claims that he would have never done such a thing had it not been for Bennie who led him astray this particular night.

This white man states that the tobacco barn was bloody inside where they apparently tried to hang the driver, but hearing his voice afterwards, it is assumed that they took him from the hanging position and dragged him outside and beat his head approximately four inches in the earth. Bennie and Lloyd Ray's clothes were bloody in front as if they held the driver up and attempted to carry him in their arms. Their clothes were found the following morning at Lloyd Ray's home. No one knew about the incident until Lloyd Ray's sister, who is a maid for someone near by, advised that she could not go to work that day because of having to wash Lloyd Ray's and Bennie's clothes. Upon immediate investigation, the clothes were found but the two boys were not located immediately.

Lloyd Ray was found at his girl friend's house about two A.M. the following Monday morning. Bennie came to his first cousin's house the following Tuesday morning and those living in the house informed this white man of Bennie's presence. The law "surrounded the house" and immediately took him into custody. It seems that these boys readily informed the Sheriff of what had happened and while being carried to Raleigh, they laughed at each other about the incident, advising that one was as guilty as the other.

G. M. Johnson.

(Here follow 2 Photolithographs, side folios 299, 300)





(100A)

## PETITIONERS' EXHIBIT 6

## CERTIFIED CERTIFICATE OF BIRTH

NORTH CAROLINA

PITT COUNTY

FILED

## 1. PLACE OF BIRTH—

County PittTownship Greenville

DEC 21 1950

District No. 74 5974 Certificate No. 114

City

No. U. S. DISTRICT COURT

(If birth occurred in a hospital or institution give its name instead of street and number)

2. FULL NAME OF CHILD Loia Ray Daniel

3. Sex <u>M</u>	4. Twin, triplet, or other <u>None</u>	5. Number, in order of birth <u>1</u>	6. Forename <u>Full term</u>	7. Are parents married? <u>yes</u>	8. Date of birth <u>Sept. 25</u> 19 <u>31</u> (Month, day, year)
--------------------	---	--	---------------------------------	---------------------------------------	--

## 9. Full name

Rufus Daniel

FATHER

## 10. Full maiden name

Alice Daniel

MOTHER

11. Residence (usual place of abode)  
(If non-resident, give place and State) R.F.D. Greenville12. Residence (usual place of abode)  
(If non-resident, give place and State) Greenville13. Color or race C 14. Age at last birthday 35 (years)15. Color or race C 16. Age at last birthday 32 (years)17. Birthplace (city or place)  
(State or country) Pitt Co. N.C.18. Birthplace (city or place)  
(State or country) Pitt Co. N. C.19. Trade, profession, or particular kind of work done, as spinner, sawyer, bookkeeper, etc. Farming20. Trade, profession, or particular kind of work done, as housekeeper, typist, nurse, clerk, etc. Domestic

21. Industry or business in which work was done, as silk mill, sawmill, bank, etc.

22. Industry or business in which work was done, as oyster house, lawyer's office, silk mill, etc.

23. Date (month and year) last engaged in this work

24. Date (month and year) last engaged in this work

25. Total time (years) spent in this work

26. Total time (years) spent in this work

27. Number of children of this mother (at time of this birth and including this child) (c) Stillborn (b) Born alive but now dead (a) Born alive and now living

## CERTIFICATE OF ATTENDING PHYSICIAN OR MIDWIFE

I hereby certify that I attended the birth of this child, who was born alive at 11-25 on the date above stated.  
(Born alive or stillborn){ WHEN THERE WAS NO ATTENDING PHYSICIAN  
or MIDWIFE, THEN THE FATHER, HOUSEHOLDER,  
ETC., SHOULD MAKE THIS RETURN.(Signed) Nora Hoise M. D.Given name added from  
a supplemental report

(Date of)

Address Greenville,

REGISTRAR

Filed 11-25 1931 Ward Moore

REGISTRAR

## CERTIFICATE OF REGISTER OF DEEDS

STATE OF NORTH CAROLINA,  
PITT COUNTY.I, C. P. GaskinsRegister of Deeds and Legal Custodian of the  
Records of Vital Statistics for Pitt County, North Carolina, certify that the foregoing is a true and correct copy of the Birth Certificate on file in this  
office, recorded in Volume No. 18 at page No. 1263 Vital Statistics Records.WITNESS my hand and official seal this 31 day of May 1949

(SEAL)

C. P. Gaskins  
By Blair Cox Whelless, Dep.  
Register of Deeds

(100B).

## PETITIONERS' EXHIBIT 7

S.A.B. Form No. 15-Bureau Vital Stat. Form 1930

930 WALKER H. D. Certification

Edwards

Daughton Co., Raleigh-193613-1222

## North Carolina State Board of Health

## BUREAU OF VITAL STATISTICS

## STANDARD CERTIFICATE OF BIRTH

FILED

1. PLACE OF BIRTH—  
County: Pitt DEC. 21 1950  
Township: Greenville A. HAND JAMES, CLERK  
City: Greenville U. S. DISTRICT COURT  
(If birth occurred in an institution, give its name instead of street and number) Ward

2. FULL NAME OF CHILD: Bennie Daniel If child is not yet named, make supplemental report, as directed

3. Sex: M 4. Twin, triplet, other: None 5. Premature: No 6. Are parents married? Yes 7. Date of birth: Nov. 1, 1931  
(Month, day, year)

8. Full name: David Daniel FATHER 13. Full maiden name: Racie Hart MOTHER  
10. Residence (usual place of abode) (If non-resident, give place and State): R. 3, Greenville 14. Residence (usual place of abode) (If non-resident, give place and State): R. 3, Greenville

11. Color or race: C 12. Age at last birthday: 27 (years) 15. Color or race: C 16. Age at last birthday: 24 (years)

17. Birthplace (city or place) (State or country): Pitt Co., N. C. 18. Birthplace (city or place) (State or country): Pitt Co., N. C.

19. Trade, profession, or particular kind of work done, as spinner, sawyer, bookkeeper, etc.: Farming 20. Trade, profession, or particular kind of work done, as housekeeper, typist, nurse, clerk, etc.: Domestic

21. Industry or business in which work was done, as silk mill, sawmill, bank, etc.: None 22. Industry or business in which work was done, as own home, lawyer's office, silk mill, etc.: None

23. Date (month and year) last engaged in this work: 1931 24. Date (month and year) last engaged in this work: 1931

25. Total time (years) spent in this work: 10 26. Total time (years) spent in this work: 10

27. Number of children of this mother (at time of this birth and including this child) (a) Born alive and now living: 1 (b) Born alive but now dead: 0 (c) Stillborn: 0

## CERTIFICATE OF ATTENDING PHYSICIAN OR MIDWIFE

I hereby certify that I attended the birth of this child, who was Born alive at 1 A. M. on the date above stated.  
(Born alive or stillborn)

WHEN THERE WAS NO ATTENDING PHYSICIAN OR MIDWIFE, THEN THE FATHER, HOUSEHOLDER, ETC., SHOULD MAKE THIS RETURN.

(Signed) Nora House, M.D.

Given name added from a supplemental report: (Date of)

Address: Greenville

REGISTRAR

Filed: 11-12, 1931

Ward Moore

REGISTRAR

STATE OF NORTH CAROLINA,

CERTIFICATE OF REGISTER OF DEEDS

PITT COUNTY.

I, C. F. GaskinsRegister of Deeds for Pitt County.

North Carolina, certify that the foregoing is a true and correct copy of the Birth Certificate on file in this office, recorded in Volume No. 18

at page No. 1257 Vital Statistics Records.

WITNESS my hand and official seal this 31st day of May, 1931.

(S E A L)

C. F. Gaskins  
Register of Deeds

(NOTE) Chapter 118, Sub-Chapter 2, Section 7109 of the Consolidated Statutes of North Carolina designates the Register of Deeds of each County as the legal custodian of Vital Statistics Records.



[fol. 301]

## PETITIONERS' EXHIBIT 6A THROUGH 6U

## Ayden Township

## On Jury Scroll

Nellie Clemons  
 William Evans  
 J. W. Ormond  
 Mrs. J. W. Ormond  
 Harvey Phillips  
 H. R. Reeves  
 John Thrower  
 Willie Cox  
 J. L. Smith  
 W. Ray Smith  
 Paul Williams  
 Charlie Williams  
 David Braxton

R  
 R T 1414  
 R  
 R  
 R T 1626  
 R T 1648  
 R  
 T 1345 RW  
 T 1693 RW\*  
 R 1702 RW  
 T 1763 RW  
 T 1749 RW  
 T 1252 (also white—T 86) RW

## Not on Jury Scroll

Nancy Becton  
 Mazella Burney  
 Lillie C. Evans  
 Wright D. Hardy  
 Roosevelt Hardy  
 Mrs. Roosevelt Hardy  
 J. D. Lennon  
 Sarah Reeves  
 Fred Shepherd  
 Sarah Shepherd

R  
 R  
 R  
 R  
 R  
 R  
 R  
 R  
 R  
 R

Total number of Negroes on Tax List ..... 589

\* Actually J. Q. Smith on R book, but written in such a way that the Q could easily be read "L".

Filed Dec. 21, 1950, A. Hand James, Clerk, U. S. District Court, E. Dist. No. Car.

[fol. 302]

## Beaver Dam Township

## On Jury Scroll

Total number of Negroes on Tax List .....

## Not on Jury Scroll

185

[fol. 303]

## Belvoir Township

## On Jury Scroll

George Wimberly T 360  
 Total number of Negroes on Tax List .....

## Not on Jury Scroll

116

[fol 304]

## Bethel Township

## On Jury Scroll

J. B. Chance R T 581  
 Salonia Armistead McNair R T 753  
 Total Number of Negroes on Tax List .....

## Not on Jury Scroll

Mrs. J. B. Chance R  
 Rev. J. E. V. Wilson R

352

[fol. 305]

## Carolina Township

## On Jury Scroll

Total number of Negroes on Tax List .....

## Not on Jury Scroll

236

[fol. 306]

## Chicod Township (No. 1)

## On Jury Scroll

Wyatt Pollard T 1420 (white T 803) RW  
 Total number of Negroes on Tax List (for Chicod Township as a whole) ... 396

## Not on Jury Scroll

T. H. Howard ( R

[fol. 307]

## Chicod Township (No. 2)

## On Jury Scroll

## Not on Jury Scroll

Charlie Hardee	T 1281 RW
Elbert Stokes	T 1469 RW
John Williams	T 1507 RW

[fol. 308]

## Chicod Township (No. 3)

## On Jury Scroll

## Not on Jury Scroll

Ed A. Chapman	R T 1174
Clifton Coward	RW T 1191 (white—T 210)

[fol. 309]

## Chicod Township (No. 4)

## On Jury Scroll

## Not on Jury Scroll

Henry Smith	T 1453 (white—T 890) RW
-------------	-------------------------

[fol. 310]

## Falkland Township

## On Jury Scroll

## Not on Jury Scroll

Nelson Hopkins	R T 448	Mamie Anderson	R
		J. T. Bell	R
		Andrew Bell	R
		James Hopkins	R

Total number of Negroes on Tax List..... 181

[fol. 311]

## Farmville Township

## On-Jury Scroll

## Not on Scroll

H. W. Baker	R	C. J. Artis	R
J. B. Baker	R	John E. Artis	R
C. Walter Bullock	R	Marie Artis	R
H. B. Bynum	R	M. F. Artis	R
Mrs. Lang Davis	R	L. T. Artis	R
Will U. Davis	R T 1177	Mildred Artis	R
Azell Edwards	R T 1219	Lucy Baker	R
Bessie B. Edwards	R T 1221-1222?	I. S. Bennett	R
Wright Edwards	R T 1225	Joseph Blount	R
Lula Ellis	R	Madeline Blount	R
Mrs. Sula Exum	R T 1232	O. L. Blount	R
Charlie Fields	R T 1237	R. P. Blount	R
J. Herbert Joyner	R	Madeline L. Blount	R
Joe R. Joyner	R	Frank R. Brewington	R
Will C. Joyner	R T 1378	George Burney	R
Lena Moye Joyner	R T 1371	Moses Burton	R
George Lang	R T 1417	Inez Chestnut	R
J. H. May	R	L. H. Chestnut	R
Joseph May	R T 1426	J. R. Dupree	R
T. H. McKinney	R	Mattie Dupree	R
Clifton D. Parker	R (T 1481—no "D.")	W. M. Faison	R
Martha L. Parker	R	Bennie Goreham	R
Eddie Redwood	R	J. Archibald Joyner	R
Ada A. Suggs	R	Louis King	R
C. M. Suggs	R	C. E. Knight	R



On Jury Scroll

Not on Scroll

H. B. Suggs	R T 1545	Mrs. C. E. Knight	R
Mrs. H. B. Suggs	R	Lawrence Mock	R
James W. Taylor	R T 1558	D. T. Phillips	R
Agnes Taylor	R	F. E. Rountree	R
Celia Turnage	R	Christine Walker	R
Paul Gay	RW T 1260 (also white—T 343)	Lyman Wooten	R
Willie Johnson	RW (Willie Johnson, Jr.—T 1346)		
William Jones	RW T 1359		
Mary Parker	RW T 1480		
Total number of Negroes on Tax List			630

[fol. 312]

Fountain Township

On Jury Scroll

Not on Jury Scroll

W. B. Moore	R	Atkinson, Walter	R
C. A. Whitfield	R T 430	Hemby, S. E.	R
		Whitfield, J. A.	R
		Whitfield, Beatrice	R

Total number of Negroes on Tax List 121

[fol. 313]

Greenville Township (General)

On Jury Scroll

J. T. Brown	T 3568 (white T 404)
Jordan Daniel	T 3703 (white T 721)

[fol. 314]

Greenville Township (No. 1)

On Jury Scroll

Not on Jury Scroll

Artis, I. A.	R T 340	Allen, Maggie B.	R
Artis, Lillian	R	Bartlett, M. L.	R
Allen, Travis M.	R	Bartlett, Quinn	R
Bradley, Madeline	R	Battle, J. A.	R
Davis, James Coy	R	Battle, Della May	R
Daniel, Daisy L.	R	Battle, Esosabeth	R
Davenport, V. H.	R T 376	Bradley, Lena O.	R
Elliott, Edmond	R T 388	Davenport, Selina Q.	R
Elliott, Thelma	R	Depree, Dennis	R T 3753
Flanagan, Charlotte	R	Dupree, Etta	R
Garrett, Mamie G.	R	Flanagan, W. E.	R
Graves, Edna B.	R	Nimmo, J. A.	R
Gore, Daniel	R	Thompson, Mildred G.	R
Grimes, James W.	R T 3918	Wilson, Douglas	R
Little, Eliza J.	R T 4247		
Lawrence, J. C.	R		
Maye, J. W.	R T 4276		
McLawhorn, H. J.	R		
Phillips, Sallie A.	R T 4441		
Spence, Addie Foreman	R		
Taylor, Lillie R.	R T 4650		
Whitfield, G. R.	R T 4785		
Brinkley, Thos. B.	T 3543 RW		

Total number of Negroes in Tax List (for Greenville Township as a whole) 1,537

[fol. 315]

## Greenville Township (No. 2)

## On Jury Scroll

Bizzell, John H.	R
Cherry, Will	R
House, Bernice	R
Johnson, R. E.	R
Lang, Selena S.	R T 4189
Lewis, Matthew	R T 4235
Morris, Clifton	R
McGlone, Chas. C.	R
Wooten, J. H.	R
Davenport, W. H.	T 3706 RW

## Not on Jury Scroll

Capehart, Wm.	R
Capehart, Amelia	R
Carraway, Halse M.	R
McGlone, Elizabeth C.	R
Norcutt, Wiley P.	R
Staton, E. N.	R
Taft, J. B.	R
Taft, Lola	R

[fol. 316]

## Greenville Township (No. 3)

## On Jury Scroll

Is. ael Atlama	R T 3375
Jas. A. Adams, Jr	R T 4890
J. I. Baker	R
Howard Barnhill	R
Ertie Blackwell	R
Ruth Bynum	R
Chas. Z. Davis	R T 3712
Elizabeth Davis	R T 3710
Joseph Donaldson	R T 3733
Earnest Dupree	R T 3747
Thaddeus Forbes	R T 3837
Louis G. Forbes	R
Hall, Mamie Paige	R
Evelyn Harris	R
F. J. Jinkens	R T 4084
Jessie L. King	R T 4182
Gertrude Latham	R
Ed Lee Latham	R T 4221
C. G. Mabry	R
Anna O. Mason	R
Willie Miller	R
Washington Miller	R
H. R. Miller	R
Thelma Moore	R
P. W. Moore	R T 4302
William Myers	R
Louise McConnell	R
Alan E. Murell	R
Frank Norris	R
Sarah Page	R T 4398
Robert Parker	R
Henry Payton	R T 4410
Roy P. Payton	R T 4413
R. M. Phillips	R
Donovan Phillips	R T 4442
Sudie Staton	R
Henry Turnage	R
Walter West	R
Sylvester Wilson	R T 4848
Willie Wilkins	R T 4797
L. W. Wooten	R T 4882
Jimmie Elks	T 3785 RW
Willie James Hester	R T 4019
Joyner, R. L.	T 4165 WR
Lester Jones	T 4124 WR

## Not on Jury Scroll

Belle Mae Atkinson	R
Gerry Barnes	R
Jno. Frank Barrett	R
Bell, Grant	R
Doris Bell	R
Rosa E. Bell	R
Lucinda Daniel	R
Lillian Donaldson	R
Charles M. Epps	R
Elizabeth Kearney	R
Mrs. Olga Myers	R
Chestie McKnight	R
Beatrice P. Newell	R
Evelyn Norris	R
Flora A. Phillips	R
Sudie Rasbury	R
Eether May Rich	R
Lucile Rich	R
Sylvia Smith	R
Vivian Shiver	R
Hilda Thompson	R
Minnie P. Turner	R
Irene Wilkinson	R

[fol. 317]

## Greenville Township (No. 4)

## On Jury Scroll

Lemuel Clements	R
S. W. Croom	R T 3680
J. H. Donaldson	R
William Ebron	R T 3772
Robert Grimes	R T 3915
John Henry Harris	R T 3966
George Lee Jenkins	R T 4078
Hillard Murill	R T 4344
S. I. Saulter	R
Charles A. Shiver	R
J. B. Webster	R
Anthony Wilkes	R T 4796
Willie Wilkins	R T 4797
Robert L. Shiver	R
Herbert Whithard	R T 4768
L. D. Taylor	RW T 4653
Richard Anderson	RW T 3396 (white T 72)
LeRoy Barnes	R T 3442
Daniel Early	RW T 3755
Wm. S. Harris	RW T 3985 (white T 1313)
Charlie Harris	RW T 3981
LeRoy Hardee	RW T 3932
Jessie L. King	R
(also in Greenville No. 3)	
J. S. Maultsby	R
Jesse Smith	RW T 4546 (white T 2633)
George E. Merritt	R T 4278
Sam Mayo	RW T 4277

## Not on Jury Scroll

Julis Best	R
Laura Carr	R
(Two Laura Carrs on Tax book with different middle initials)	
Alonzo Cherry	R
Nena Cherry	R
Portia Dudley	R
Graye, Lottya	R
Lillian Hardee	R
Catherine Harris	R
Thelma Hawkins	R
Dolly A. Keyes	R
Lavania Latham	R
W. Virginia Laughinghouse	R
Cora Belle Miller	R
Lillian Murill	R
Mildred Purvis	R
Rev. O. James Rooks	R
Sadie P. Rooks	R
Jeannette J. Sillo	R
Annie L. Streeter	R
Louis Vince	R
Mabel Wilson	R

[fol. 318]

## Grifton Precinct

## On Jury Scroll

Arthur Mills	T 1570 RW
Robert Moore	T 1582 RW
*M. C. Dixon	T 1379 (Ayden)
*Duggins, Isaac	T 6034 (Swift Creek)
Gaskins, Walter	RW T 670
White, James	RW T 810

\*Added to end of list out of order in jury scroll book.

## Not on Jury Scroll

Duffie Abbott	R T 1197
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[fol. 319]

## Pactolus Township

## On Jury Scroll

Total number of Negroes on Tax List	126
-------------------------------------	-----

## Not on Jury Scroll

[fol. 320]

## Swift Creek Township

## On Jury Scroll

Gardner, William	T 662 RW
Smith, Jesse	T 775 RW
Total number of Negroes on Tax List	259

## Not on Jury Scroll

[fol. 321]

On Jury Scroll

Winterville Township

Not on Jury Scroll

S. P. Barrett	R
P. R. Canady	R
O. W. Gardner	R T 762
W. H. Robinson	R T 893
Worthington, Lester	RW T 975
Total Number of Negroes on Tax List	

342

[fol. 322] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. a] IN UNITED STATES COURT OF APPEALS FOR THE  
FOURTH CIRCUIT

APPENDIX TO APPELLANT'S BRIEF

[fol. 1] J. D. JOYNER being first duly sworn, testified as follows:

Direct examination.

By Mr. Rogge:

(p.13) Q. Will you state your name, please?

A. J. D. Joyner.

Q. Where do you live?

(p.14) A. Farmville, North Carolina.

Q. Is that in Pitt County?

A. It is.

Q. Have you held office in Pitt County?

A. I have.

Q. What office have you held?

A. Register of Deeds and also tax supervisor and collector in Pitt County.

Q. As Register of Deeds any ex-officio office?

A. At that time I was ex-officio clerk to the board of county commissioners.

Q. Do you have the tax list for 1946-49?

A. No sir.

Q. You went out of office when?

A. December 1, 1949. \* \* \*

(p.15) Q. How were those tax lists kept while you were there? Did you have segregation as between white and negro Tax payers?



A. Yes, sir.

Q. You had white tax payers on one list?

A. Yes, sir.

Q. And negro tax payers on another?

A. Yes, sir. . . .

(p. 16) Q. You were clerk ex-officio of the board of county commissioners from when to when?

A. September 1, 1946 to July 15, I believe it was, of '47.

Q. Can you tell us a little about Pitt County? Is it divided into townships?

A. Yes, sir.

Q. How many townships in Pitt County?

A. Thirteen.

Q. Is it also divided into districts?

A. Commissioners' districts, yes.

Q. How many of those?

A. Five.

Q. How many commissioners are there?

A. Five.

The Court: That division of the county into Commissioners' districts doesn't show up in the tax list?

A. No, sir.

The Court: The tax list is for the county as a unit and commissioner's district is for the selection of the commissioner?

A. Yes, sir.

Q. As ex-officio clerk of the board of county commissioners (p.17) what were your duties?

A. To be present at meetings of county commissioners and make record of actions taken.

[fol. 2] Q. Did you have anything to do with drawing list for juries in 1947?

A. Yes, sir.

Q. And tell us just what you did?

A. To the best of my recollection the first meeting in June the county commissioners instructed.

Q. June of '47?

A. Yes, sir. County Commissioners instructed me to prepare for them a jury list, to refer to the tax books and county registration book or any other source to get a list

before them of the persons in the county twenty-one years of age or over to comprise the jury list. \* \* \*

(p.20) Q. Let's find out what you actually did. You are now getting ready to prepare the list for the board of county commissioners?

A. Yes, sir.

Q. And did you go to the county registration files?

A. The best of my recollection we went first to the tax list and from there to the registration books.

Q. Did you consult any other sources except the tax list and registration books?

A. Not to my recollection.

Q. These are the records of Pitt County?

A. Yes, sir.

Q. The tax list, as you have told us, is divided between white and negro taxpayers?

(p.21) A. Yes, and also by townships.

Q. Tell us what you did? Did you make up one complete list for the county, or did you do it by districts, or did you do it by townships?

A. To the best of my recollection it was made up by townships.

Q. Sometime there are more than one township in a district?

A. Which district are you referring to?

Q. In Pitt County I understand there are five districts and each commissioner has a district?

A. The registration books are divided into electoral districts which doesn't necessarily conform to commissioner's district.

Q. I want to get at what you did?

A. I would like to clarify one statement I made.

Q. Please do.

A. The original list made up from the registration book and checked against the tax books and list made up were not according to electoral district and didn't necessarily conform to townships because each township could have had more than one electoral district.

Q. You went to the registration list first because you thought that was in accordance with the change in the statute?

A. That's correct.

Q. Tell us what you did with respect to the registration list of registered voters?

(p.22) A. There was a copy made of the list.

Q. Of the registered voters in Pitt County?

A. Yes, sir.

Q. Where is that copy and who keeps it?

A. County chairman of the board of elections has charge of it.

Q. Do you know his name?

A. J. H. Harrell.

Q. Did you go to Mr. Harrell?

A. I went to Mr. Harrell and obtained his permission to use the books.

[fol. 3] Q. You went to Mr. Harrell and asked him whether you could have access and make use of the county registration list for Pitt County?

A. Yes, sir.

Q. You were about to tell us how they were kept?

A. Registration books kept by election districts.

Q. How many of the election districts in Pitt County?

A. I couldn't say.

The Court: Isn't that a statewide practice?

A. I assume it is statewide practice. I know in this county and other counties I know about they have certain number of precincts and that is statewide.

Q. Now suppose you tell us exactly what you did with this registration list?

A. I had access to the registration books and had copy made (p. 23) of them insofar as the name and precinct in which the name was.

Q. You go up a list of names with the precincts?

A. Yes, sir.

Q. How did you get that?

A. Went through the books and had the young lady who typed out the list.

Q. Did you make copies at the time?

A. Best of my recollection it was made in duplicate.

Q. You had the young lady with a typewriter and you dictated the names with precinct and she typed them on a sheet of paper?

A. No, I wouldn't say that is the case. So far as me dictating it that's not the case. The book was turned over to her and she went through the books and copied the names.

The Court: All of them?

A. To the best of my knowledge she did.

Q. The Court: White and negro?

A. To the best of my knowledge she did.

Q. You told her, "I want you to copy all the names together with the precincts"?

A. Yes, sir.

Q. You now have a list of names. You recall how many pages?

A. No, sir.

Q. Was precinct written after the name?

A. Yes, sir.

Q. What is the next thing you do?

(p. 24) A. The next thing I got the precincts together according to the township they represent.

Q. When she got through with the precincts if she was in the middle of a page she stopped?

A. Yes, sir.

Q. What you ended up with was a list of names for each precinct taken from the registration book?

A. Yes, sir.

Q. What did you do with the list of names by precinct taken from the registration books?

A. Got them together by township and verified with the tax list in order to make certain that there were no names left off. That is that the tax list was complete insofar as that list was concerned. Do I make myself clear?

Q. No, I don't think I quite understand you. Did you add names to the list?

[fol. 4] A. If we found names on the tax list which were not on the registration list we did.

Q. Did you find names like that?

A. That's a difficult question to answer because I don't recollect. I don't recall adding or not adding. It was a mechanical job.



Q. You supervised the job?

A. Yes, sir.

(p. 29) Q. Went first to the names of white taxpayers because white came first. Starting off in the first township you have white list and as you complete the white list starting with the very next page is colored list and in verifying the list from the registration book they would have started in the front of the tax book, verifying the whites in the first township and then gone to the negroes in the first township against the corresponding townships of the registration books?

A. That would be the accepted procedure.

Q. Do you think that happened?

A. I am quite certain it did.

Q. When this was done what happened to the list of names that had been compiled pursuant to your instructions?

A. They were turned over to the commissioner insofar as the township related to their commissioner districts.

Q. Did you now collect the names by districts?

A. The list was at this point made up by townships and if one of the commissioners had three townships in his district he (p. 30) was given the list for those three townships to verify.

Q. In other words you knew which townships in his district?

A. That's correct.

Q. Are you the one who took this list to the different commissioners?

A. I gave it to them.

Q. Do you recall giving them these different lists of names?

A. Yes, sir.

Q. You remember about when that was?

A. No, I couldn't give the date.

Q. It would be some time after June, 1947?

A. Yes, sir.

Q. You know what happened to them thereafter?

A. After they went through them they returned them to me. They went through the lists and inspected them.

Q. Were you present at any subsequent meeting of any board of county commissioners where these lists were discussed, your personal knowledge of whatever happened to the list compiled under your supervision?

A. Yes. You are referring to the meeting in which they accepted the list.

Q. You have told us about getting up the list by township, went to the registration list and then to the tax list?

A. Yes, sir.

[fol. 5] Q. This all pursuant to your supervision and instructions?

A. Yes, sir.

(p. 31) Q. And then you took the list to the respective commissioners?

A. Yes, sir.

Q. Did you keep any copies of those lists?

A. Yes, sir.

Q. Do you have a copy of these lists now?

A. No, sir.

Q. You made up the original and duplicate?

A. At that time, yes.

Q. Can you tell us just how many copies you made?

A. To the best of my recollection there were two copies made, original and one copy.

Q. You mean one copy was made in addition to the original?

A. That's correct.

Q. Suppose we would like, as I would, a copy of this list you prepared. Is there a way I can get a copy?

A. There is a book in which the jury scrolls are kept, permanent record. One copy goes into the jury box and one copy in the book as complete record.

\* \* \* \* \*

(p. 32) Q. You mean the one you gave to the commissioners was finally (p. 33) returned to you?

A. Yes, sir.

Q. With various names stricken out?

A. Yes, sir.

Q. At what point of time was that returned to you? How long after you gave it to the respective commissioners?

A. Within a matter of a day or two, I don't recall.

Q. A day or two after you gave it to the commissioner he gave it back to you with the names he had stricken out?

A. Yes, sir.

(The Court recessed for fifteen minutes)

Q. We were right at the point where the list you had prepared you gave to the commissioners and the commissioners gave it back to you. Then what happened to it?

A. You are referring to the time I turned the list over to the commissioner?

Q. Yes.

A. The original list I prepared?

Q. Given by you to the commissioners and a day or two later given back to you by the commissioners. Then what happened to it?

A. After they had made deletion the list was rewritten leaving out the names they had seen fit to delete.

(p. 46) J. H. HARRELL, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Rogge:

Q. Will you please state your name?

A. J. H. Harrell.

Q. Your residence?

A. Greenville, North Carolina.

Q. Do you hold any public office?

A. Chairman of Pitt County Board of Elections.

Q. How large is that board?

A. Three-man board.

[fol. 6] (p. 47) Q. You are the chairman of it?

A. Yes, sir.

Q. And how long have you held that office?

A. Some over twelve years.

Q. You were there in 1946 and 1947?

A. Yes, sir.

Q. You have been subpoenaed to bring the registration lists from 1946 to 1949. Do you have those volumes here?

A. Yes, sir.

Q. Will you produce them?

A. Here they are.

Q. These volumes you have brought are the ones we have subpoenaed?

A. Yes, sir.

(p. 48) Q. Mr. Joyner told us these were kept by precinct?

A. Yes, sir.

Q. Is his statement correct?

A. Yes, sir.

Q. I take the first one on the list, Greenville No. 2 Precinct?

A. That's right. Greenville is divided into four precincts.

Q. I happened to pick the one that is Precinct 2 Greenville?

A. Yes, sir, the larger precincts some have larger books.

Q. Are the names copied in alphabetical order by precinct?

A. Yes, sir.

Q. I have picked at random to the "C". After the names there are two columns, one labeled "White" and one "Colored"?

A. That's right.

Q. And next following is the name, putting it in one column or the other?

A. Yes, sir.

Q. And on the page I happened to turn to there are how many names?

A. Seventeen.

Q. Of the names can you tell us how many white and how many colored?

A. One colored and sixteen whites according to the records.

Q. Let's turn to page C5 in the same book. How many names on that page?

A. Twenty-eight.



(p. 49) Q. And can you tell us how many white and how many negro?

A. Twenty-eight white. No colored.

Q. C6, there is a division between columns labelled white and colored?

A. Yes, sir.

Q. How many white and how many negroes?

A. Seven on that page and all white.

Q. The next page C7, can you give us the same information as to that page?

A. Twenty-six registered on that page and all white.

Q. Can you tell us whether you have any information anywhere showing how many white and how many negroes registered by precincts?

A. No, sir.

Q. There are apparently very few negroes registered on the pages we have examined?

[fol. 7] A. Yes, sir.

Q. And will that average hold true for the other pages in other volumes?

A. I don't know. I don't know whether the average will hold true or not, but the percentage is small.

(p. 51) W. W. SPEIGHT, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Moody:

Q. State your name and business?

A. W. W. Speit; an attorney of Greenville.

Q. How long?

A. I started in 1939, interrupted by the war years and resumed in 1946 and until now.

Q. Received your education where?

A. LLB: University of North Carolina. Undergraduate work at the University.

Q. Serve any state office?

A. Institute of Government doing criminal law research, and Attorney General law office.

(p.52) Q. What do you do now?

A. Practice law in Greenville, James and Speight.

Q. The record in the State Court shows you and another attorney were appointed at the March Term, 1949 Superior Court of Pitt County to defend the petitioners, Lloyd Ray Daniels and Bennie Daniels?

A. That's correct. I was appointed to defend Lloyd Ray Daniels, and Mr. R. P. Corey was appointed to defend Bennie Daniels.

Q. Do you remember when they were arraigned?

A. Yes, sir.

Q. Had you been appointed when they were arraigned?

A. Yes, sir.

Q. And entered pleas to the bill of indictment?

A. Yes, sir.

Q. The record shows you didn't move to quash.

Objection by petitioners. Objection overruled.

Mr. Rogge: Why previous counsel may or may not have done anything, why a lawyer didn't do something which I think under the circumstances should have been done—

A. I didn't move to quash because I knew the grand jury, most of the members personally, knew the foreman, and considered they would give fair consideration to the evidence.

(p. 54) Cross-examination of W. W. Speight.

By Mr. Rogge:

Q. This grand jury, Mr. Speight, that you were talking about had no negroes on it?

A. There were none on it.

Q. As a matter of fact you have never had a negro on a grand jury in Pitt County?

A. I don't know of any.

Q. And you have been practicing since 1939?

A. Yes, sir, but not in Pitt County.

[fol. 8] Q. How long have you been practicing in Pitt County?

A. January 1, 1947.

Q. Since that time there has been no negro on the grand jury in Pitt County?

A. Not to my knowledge.

S. M. UNDERWOOD, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Moody:

Q. You are Sam Underwood?

A. Yes, sir.

(p.55) Q. Where do you live?

A. Greenville, North Carolina.

Q. Your profession?

A. I am a lawyer.

Q. What position have you held with reference to Pitt County?

A. I served as county attorney.

Q. How long?

A. Mr. Moody, If I recall correctly I was appointed in September, 1946 and served through this month.

Redirect:

(p.68) Q. What was the system of the number of the grand jurors?

A. We have the staggering system in Pitt County. Nine are drawn at the first criminal term in August to serve for six months, and nine drawn at the first criminal term in January to serve six months. I beg your pardon, twelve months. So we have constantly a grand jury, eighteen members, nine with six months experience.

Q. Was that true of the grand jury at this time?

A. Yes, sir.

(p.69) Mr. Rogge: When you run through the total of twenty precincts the Judge reached in his finding No. 17) that the registration and poll books of 1946 containing list of persons over twenty-one years of age residing in the county who were qualified voters contained the names of 20,065 white persons and 423 negro persons. That is the Judge's computation of the nineteen witnesses I am calling to Your Honor's attention.

(p.70) H. L. ANDREWS, being first duly sworn, testified as follows:

Direct examination.

By Mr. Rogge:

Q. Will you state your name?

A. H. L. Andrews.

Q. Where do you live?

A. Pitt County, Greenville.

Q. Held any public office?

A. Pitt County tax collector.

Q. From when to when?

A. 1933 to 1946. Skipped a couple of years and been tax [fol. 9] collector since.

Q. You were tax collector in 1946?

A. Yes, sir.

(p 71) Q. I hand you volume "Tax Ledger 1946, Pitt County" and ask you can you identify this?

A. Yes, sir.

Q. What is it?

A. Tax book and levy 1946, White and colored.

Q. Is that divided by precincts?

(p.72) A. No, townships.

Q. How many townships in Pitt County?

A. Thirteen.

Q. Then this has thirteen divisions?

A. Yes, sir.

Q. The first division is for Beaverdam Township?



A. No, sir, Ayden.

Q. I take it that the first names would begin with Adams and the like, running through. Do you have any page numbers?

A. We go by ticket number. We don't go by page number.

Q. Running through the first, 1700 tickets.

A. 1196 is the white in Ayden Township.

Q. Running through 1196 from the first name "Abbott" and your last name "Yelverton", those are the first pages in the book?

A. Yes, sir.

Q. That is followed by a page that is what?

A. Late folks who come in to list taxes after the books are fixed up.

Q. And they get a page by themselves?

A. Yes, sir.

Q. Then you have several blank pages?

A. Yes, sir.

Q. You had one on which you put the people who came in late or moved in after you had made this up?

A. That's right.

(p.73) Q. Then three blank pages?

A. This page goes with the preceding book.

Q. So you have just two blank pages between the white and negro sections?

A. There are some names at the bottom of the page.

Q. What are they?

A. We left off here, 1196, and start at 1197.

Q. Are these also some late-comers?

A. No, sir, that is the colored in Ayden Township.

Q. How come you start near the bottom of the page?

A. Because 1196 was the other one and 1197 is the other.

Q. Since Yelverton was 1196, what about those extras you have in here?

A. I just told you.

Q. Your reason is since the last item on the page dealing with the white section was 1196 you start the negro section 1197, beginning over again alphabetically with the name Abbott?

A. Whatever it starts with.

Q. And on this it is Abbott?

A. Yes, sir.

[fol. 10] Q. And following there were 1197 with the name Abbott through the name Younger, dealing with Negro taxpayers in Ayden Township? Did you follow the same method with reference to all of the remaining townships?

A. Yes, sir.

(p.74) Q. Now, Mr. Andrews, can you give us the total number of white people on the tax list for Pitt County for the year 1946?

A. No, sir.

Q. You gave that on the preceding trial?

A. Yes, sir. The Judge sent me down and let me count them.

Q. If I show you this volume will that refresh your recollection of what you had for 1946?

The Court: Is it your contention that what he said then is correct?

Mr. Rogge: Yes, sir.

The Court: It is admitted.

(p.75) Mr. Rogge: His answer was for the year 1946 a total of 15,517. "Question: Have you the total for white persons?" "Answer: Yes, 10,344". "Question: Have you the total for negroes on that list?" "Answer: Yes, 5173", on which the Judge based his finding 17, that the tax list for 1946 contained 15,517, of which 10,344 were white and 5,173 were negro taxpayers.

(p.78) DAVID T. HOUSE, JR., having been first duly sworn, testified as follows:

Direct examination.

By Mr. Rogge:

Q. Please state your name?

A. David T. House, Jr.

Q. Where do you live?

A. Bethel, Pitt County.

Q. Do you or have you held any official position in that county?

A. Yes, sir.

Q. Tell us what?

A. Clerk of the Superior Court.

Q. And from when to when have you been Clerk of the Superior Court of Pitt County?

A. Since July 3, 1945 until the present time.

Q. You are still Clerk of the Superior Court of Pitt County?

A. Yes, sir.

(p.82) Q. You get from the sheriff a list of the number he has served and that goes in your book?

A. Yes, sir.

Q. That made a total of 2685 from August, 1945 until May Term, 1949?

A. Yes, sir.

[fol. 11] (p.83) Q. During the time you have been clerk is my information correct that on the grand jury there have been no negroes?

A. Yes, sir, there have not.

Q. There has not been one on the grand jury?

A. Not since 1945 until today.

The Court: How do you know that?

A. There is no record but I don't remember seeing one. My recollection is no negroes have served on the grand jury but there is no way of telling from my records because no distinction made between the two.

Q. You have been present at every grand jury sitting and every court since 1945?

A. Yes, sir.

Q. You have never seen a negro on the grand jury?

A. I don't recall one.

(p.84) Q. Since you have been seeing them you have never seen a negro on the grand jury?

A. That's right. I didn't know anything about the grand jury until I became clerk.

Q. I don't want to get anything but the facts. I limit my time from the time you became clerk in 1945 until the present time. You have seen grand juries in that time?

A. Yes, sir.

Q. And you have seen no negro in Pitt County on the grand jury?

A. That's right.

Q. If you had seen one you would have remembered it?

A. I think so.

Cross-examination:

(p.89) Q. Does your recollection enable you to state whether any negroes have been customarily drawn on the panel since 1947?

A. We have had negroes on practically all the panels since 1947. I couldn't say but sometimes one and sometimes two. I have seen as high as four or five.

Q. Isn't it a fact they actually serve on the petit juries?

A. Yes, sir.

Q. In criminal as well as civil cases?

A. Yes, sir.

Q. And isn't it a fact that that is not only just a rare occurrence but a common occurrence?

A. Yes, sir, it is.

Q. In the term of court at which these petitioners were tried (p. 90) were there not several negroes on the jury panel?

A. As I recall there was. There had to be because we had one on the jury that tried him.

Q. He sat on the case?

A. Yes. I don't recall whether the original panel or not.

Q. Were there two subsequent panels drawn?

A. Yes, sir.

Q. Were there any negroes on those?

A. Yes, sir, there was.

Q. Don't you recall that one or two got off for one reason or another?



A. Yes, sir, I remember a negro asked to be excused.

[fol. 12] Q. Claimed exemption as an undertaker. He wanted to get off ahead of time?

A. Yes, sir.

Q. Didn't a negro woman called excuse herself because she was opposed to capital punishment?

A. Yes. I had forgotten that.

Redirect:

(p.91) Q. Do you recall any grand jury you didn't see at all during its sitting?

A. No, sir.

Q. They serve a year?

A. Yes, sir.

Q. How many grand juries have been selected during your term as clerk?

A. We have had eighteen each year.

Q. How many different selections have there been during your term?

A. I think we have had eleven since I have been there. Eleven drawings.

Recross-examination:

(p.93) Mr. Rogge: I call Your Honor's attention to the findings 30, 31, 32 and 33 of the trial Judge:

"30. That in the drawing of the special venire of 150, ordered by the Court in the trial of this case to supplement the panel of regular jurors in the selection of the jury, the said panel of regular jurors having been exhausted, as set out in the order made in this case, of the 150 names drawn there (p.94) were five members of the negro race; that of said five negro persons, two have died since their names were put in the jury box in 1947, and one had removed out of the county since said date, and two were summoned and reported for duty, out of the 89 persons found and summoned by the Sheriff for service on said special venire. That of the two negro

persons reporting for jury duty, one disqualified herself by disclosing that she had conscientious scruples against capital punishment, and the other negro juror was accepted, qualified and is seated upon the jury selected for the trial of this case.

31. That most all of the persons testifying with respect to the constitution of the jury in Pitt County Superior Court heretofore, testified that they had heretofore never been drawn, and one of these persons was drawn, as a member of the said special venire, from the jury box; that others testifying has been in court from time to time for only short periods, at different terms, and observed the proceedings of the court for only brief intervals. That it is a fact of common knowledge, of which the Court takes judicial notice, that the entire panel of jurors drawn for any term, is rarely, if ever, seated in the jury box in trying the case with [fol. 13] which the court is engaged. That other persons testifying to the effect that they had not been drawn for jury service, also testified that they were following occupations which exempted them from service as jurors, as provided in Chapter 9, (p.95) section 19 of the General Statutes of North Carolina, to-wit, "ministers of the Gospel, physicians, funeral directors and embalmers."

32. That a second special venire, to supplement the panel of jurors from which to select the jurors to try this case consisted of 35 drawn from the jury box in open court in the presence of the defendants and their counsel, of whom 17 were found and served by the Sheriff and reported for duty; and amongst those was a witness, a negro, who had theretofore testified that he had never been drawn for jury duty, and promptly disqualified himself and claimed exemption because he was a funeral director and embalmer.

33. That of the second venire ordered for the selection of a jury in this case two members thereof were members of the negro race, that no person was excluded therefrom by reason of race or color.

Re-re-direct examination of D. T. House, Jr.

By Mr. Rogge:

Q. Mr. House, will you state what this volume is?

A. Jury book. List of jurors listed alphabetically who have served on juries.

Q. For your term of office?

A. I think it goes back to '41.

The jury book is introduced and marked "P-1"

The tax list is introduced and marked "P-2".

The General Election books, 20 in number, are introduced and marked "P-3".

(p.96) CHARLES P. GASKINS, being first duly sworn, testified as follows:

Direct examination.

By Mr. Rogge:

Q. Please state your name?

A. Charles P. Gaskins.

Q. Where do you live?

A. Pitt County, Greenville. Lived there all my life except four years in the armed service.

Q. Have you held any state office there?

A. County office. Register of Deeds for Pitt County. Ex-officio clerk to the board of county commissioners.

Q. For what time:

A. July 15, 1947 to December 15, 1950, last Friday.

Q. By virtue of being register of deeds you were also ex-officio clerk of the board of county commissioners?

A. Yes, sir.

(p.97) Q. Now, do you also have and did you bring with you the book containing what is known as the jury scroll book?

A. Yes, sir.

[for 14] - Q. May we have that?

A. That's right over there also.

(p. 98) Q. The document referred to as jury scroll is marked "P-5."

Q. This document labeled "Jury scroll Pitt County 41-49" tell us what that is?

A. This book contains the names of the citizens of Pitt County, both white and colored, placed into the jury box and from the jury box those names drawn out and they serve or don't serve, depending on whether they were summoned or not, from 1941 to 1949.

The "Jury Scroll Pitt County, 1941-1949" introduced and marked "P-5".

(p. 99) Q. And this book contains the total list in 1949, and I take it for 1947 for these were the ones the board of county commissioners of Pitt County had decided were eligible for jury duty?

A. Yes, sir.

Q. Do you know what that total was for 1947 to 1949?

A. No, sir, I don't.

Q. Does the figure ten thousand sound about right?

A. Was that ten thousand figure for the 1947 list? I think the one I prepared for the board would be some less. I judge that from looking at this book. Less than the 1947.

Q. Is the figure ten thousand approximately correct for 1947?

A. I would think so.

Q. I notice in this book—and you have been through this book?

A. Yes, sir.

Q. I am referring now to jury scroll Pitt County, 1941 to 1949; (P-5), I notice page "Ayden Township, White, 1941". You know what that means?

A. No, sir.

Q. You have seen it before?

A. No. The extent of my looking through this book was of course roaming around the office to see what was in there. So far as (p. 100) looking at that book I have never looked at it. I am certain it goes in there.

Q. You hadn't seen that before today?



A. I think I had seen it but I hadn't noticed "white" was written on the page. You notice there is a division page for each of the years for which the jury scroll was made up.

Q. I believe you submitted an affidavit in the proceedings in the Superior Court?

A. That's correct.

Q. And you have in there, and I show it to you, among other things: "That affiant, however, out of his knowledge of various (p. 101) individuals in the county and after the Board of Commissioners of Pitt County had reviewed the name of each person drawn for jury duty for the hereinafter described terms of court and had stated to affiant the persons known to them to be a member of the negro race, does hereby certify that not less than the number of persons of the negro race indicated below were drawn for jury duty at the terms of court described below, namely: [fol. 15] October Term, 1948—Two; November Term, 1948—One; January Term, 1949—Two; March Term, 1949—Two; May 9 Term, 1949—One."

Is that correct?

A. That's correct.

Q. There were additional terms to the terms listed there?

A. Yes, sir.

Q. How many terms all told were there during that period?

A. I don't know. There are sixteen terms of Superior Court in Pitt County each year, plus two that are special term, during the four terms I have been there.

Q. You are giving it here as how many terms?

A. Two in 1948 and three in 1949.

Q. If you had had the total for the two years it would be (p. 102) about thirty-six. That is all.

Cross-examination of Chas. B. Gaskins.

By Mr. Moody:

Q. In your certificate you certified it is not less than the number you gave?

A. These numbers as shown on there were the numbers arrived at after I had looked over that particular jury

list and knew at least two were negroes. I know that by my own personal knowledge.

Q. There could have been more than that. You don't know. You made that up from your own personal knowledge of the names of these people?

A. Yes, sir.

Q. You knew there could be more and that is the reason you limited your answer?

A. Yes, sir.

Q. There could have been more?

A. Absolutely.

(p. 105) W. J. SMITH, being first duly sworn, testified as follows:

Direct examination.

By Mr. Moody:

Q. State your name and address?

A. W. J. Smith, Bethel, Pitt County.

Q. What position do you hold in Pitt County?

A. None at this time.

Q. What county office did you hold at the time of this trial and before?

A. Chairman of the board of county commissioners.

Q. When did you take office?

A. December, 1946, I think.

Q. Were you present when the jury list or panel was drawn from which nine grand jurors were drawn who found this bill, and other jurors were drawn as trial jury at the meeting of the commissioners?

A. I think so.

[fol. 16] (p. 107) Q. Will you explain how you went about making up the list?

A. We instructed the clerk and county attorney to provide us list given to us first Monday in June that year.

Q. When you received the list was there any mark or anything on the list that disclosed to you the race of anybody on the list?

A. No, sir. When the list came to us it was divided by district to each of the commissioners and they went over it. Purged any name of any person dead or they felt didn't meet qualifications morally or of sufficient intelligence.

Q. Brought back to the meeting and there is where the purging took place?

A. Yes, sir.

Q. After you met and ruled on who you wanted to omit or keep out of the list what was done?

A. The list clipped and scrolls put in the box.

#### Cross-examination:

(p. 109) Q. At the board meeting you took the list that covered your township?

A. Yes, sir.

Q. You remember the names on your list?

A. No, sir.

Q. Quite a few people on there you didn't know?

(p. 110) A. A good many.

Q. Know how many negroes?

A. I didn't pay any attention to it and had no way of knowing except in my immediate community.

Q. Tell us what process you went through in making the selection?

A. I checked the ones in my own community. If I found one was dead, or one had been under sentence in court I marked his name through and in the other townships I recall I talked the matter over in my office with two or three men.

Q. Who were they?

A. I remember Belyoir Township Mr. W. R. Holland was one. I don't remember who was with him but somebody down there.

Q. He is white?

A. Yes, sir. I can't recall that any were removed from any of the other lists. There may have been.

Q. Who were the others you checked with?

Mr. Holland is the only one I remember now, and I think Mr. Paul Lavenport possibly from Paetolus Township, or his son. We were in his store anyway.

Q. You didn't make any effort to get a lineup on every person on your list? The statute requires those of good moral character and of sufficient intelligence?

A. Yes, sir.

Q. Did you undertake to find that out for every person on your list?

(p. 111) A. I did as much as I thought was required.

Q. Did you have this kind of knowledge as to every person on your list?

A. No, sir, I didn't.

[fol. 17] Q. As to what percent did you have this knowledge?

A. That would be a pure matter of guess.

Q. Half?

A. Hardly that many.

Q. One-third?

A. Probably.

Q. As to a third you had the knowledge and as to two-thirds you didn't?

A. That's correct. I don't think the law would require me to determine as to each of these men or women. I didn't have the time to do it.

Q. Whatever the law required you had knowledge as to one-third and didn't have it as to two-thirds?

A. I assume other members of the board had the same knowledge of those men as I had of some of their areas.

Q. Just what or how much discussion was there when the board re-convened?

A. We went over the list. If anyone had any knowledge or any doubt they erased their names. I didn't go one by one over the other lists. I probably glanced over them with the other commissioners and if anyone's name was raised we probably (p. 112) discussed it.

Q. How much discussion?

A. We used a part of the session, hour or couple of hours?

Q. When you got together with these lists you had a discussion of an hour or so?



A. Something of that kind.

Q. As to the ten thousand names on it for 1947?

A. That's right.

Recross examination:

(p. 113) Q. You are aware of the fact in general terms that the registration and poll books of 1946 of a total of 20,488 names 20,065 were white and 423 were negroes?

A. I didn't know it until today.

(p. 114) Q. You knew there were not many negro names on the registration books?

A. I assume there were not.

Q. Now this Paul Davenport is also white?

A. Yes, sir.

That is all.

EVIDENCE IN RE CONFESSIONS OF LLOYD RAY DANIELS AND  
BENNIE DANIELS

The petitioners introduce in evidence birth certificate of Lloyd Ray Daniels, certified to by C. P. Gaskins, Register of Deeds of Pitt County, showing he was born September 25, 1931, and same is marked "P-6".

The petitioners introduce in evidence birth certificate of Bennie Daniels, certified to by C. B. Gaskins, Register of Deeds of Pitt County, showing he was born November 1, 1931, and same is marked "P-7".

[fol. 18] (p. 115) Objection by respondent.

Mr. Moody: The age is not at issue. They didn't raise the question in the Superior Court that they were subject to the juvenile court.

Respondent objects to all testimony bearing on petition of petitioners that confessions received at the trial were involuntary and therefore ought not to be received in evidence.

The objection is overruled.

LLOYD RAY DANIELS, being first duly sworn, testified as follows:

Direct examination.

By Mr. Taylor:

Q. State your name?

A. Loie Ray Daniels.

The Court: The certificate has the name of Loie Ray Daniels.

Mr. Taylor: There is no doubt but what his name is Lloyd.

Q. Where were you born?

A. Pitt County.

Q. You know when you were born?

A. No, sir.

Q. Who is your mother?

A. Alice Daniels.

Q. What is your father's name?

A. Rufus Daniels.

Q. Were you the only child in your family? Do you have any (p. 116) sisters and brothers?

A. I have some sisters but no brothers.

Q. How many sisters?

A. I have to count them up.

Q. Can you count them up?

A. Nine.

Q. And no brothers?

A. No, sir.

Q. Where did your family live in Pitt County?

A. They lived in two separate places. You mean that farm?

Q. What type of work did they do?

A. Farm.

Q. Did they own their own farm?

A. No, sir.

Q. Work for anyone?

A. Yes, sir.

Q. Who did they work for?

A. Miss Kate Stokes.

Q. How did your father operate that farm? Did he operate it on sharecrop basis.

A. I don't understand.

The Court: Was your father a sharecropper?

A. He rents it so much.

The Court: Rent it for so much a year?

A. No, sir.

[fol. 19] (p.117) The Court: He got a certain share of the crop?

A. Yes, sir.

Q. Did you ever go to school?

A. No sir.

Q. You know that they say you gave a confession in this case in which you are concerned?

A. Yes, sir.

Q. Will you state to His Honor what happened from the time you were picked up on the Sunday night at the time involved until the time you were supposed to have made a statement if you did?

A. Yes, sir.

Q. State what happened?

A. I went to town that Saturday. I told my mother I was going to town to get a haircut and go to the show. I went and got a haircut. Went to the show. When I left out of the show I went down town to a place called Home Grocery and come to the bus station and was sittin in the bus station and Bennie and his brother come there.

Q. What kin is he to you?

A. First cousin, and he asked me did I want to walk down town and get a pint of whiskey and I told him yes and me and him and his brother went down to the Home Grocery store and got a pint of whiskey and me and him and his brother drank it and we went and stayed a while and come back to the bus station and stayed (p.118) there not so long. I didn't have no time. I don't know exactly what time it was we went to a place called Bonner Lane. Some boys in there dancing and girls and me and Bennie went in and we started to dance and one fellow stepped on my toe. I told him to stay off my toe. He got mad and started to cussing and I started to cussing him back. We started fighting in the place but the lady told us—

Objection by respondent.

Mr. Moody: If they go into the merits we would like to.

Mr. Taylor: He is not answering my question.

The Court: If it is competent to go into the question of this involuntary confession about which I have some doubt, then it is necessary for the petitioner to show a good deal of the details surrounding the whole affair. I don't think it proper to go into all of it but I will permit some considerable leeway.

Q. You will continue.

A. We started fighting in the place and the lady told us we would have to go out, that we couldn't fight in there. Me and Bennie and a lot of boys went in front of the barber shop and started fighting. I had a short handle, black handle pocket knife. Rest of the fellows had knife. Whole lot of the rest of the fellows started fighting and all jumped on me and Bennie. The fellows jumped on me and Bennie and after the fellows jumped on me and Bennie we cut because we knowed (p. 119) they could whip us because there was more of them than us.

[fol. 20] Q. You say you all had knives?

A. I did.

Q. Did anybody use a knife?

A. Yes, sir.

Q. Anybody get cut?

A. Yes, sir. I got cut on the hand. They had me down and was on top of me.

Q. What happened after you left Bonner Lane? Where did you go?

A. Went to a place called Wet Wilson's.

Q. Where did you go from there?

A. To a place you call Busy Bee.

Q. Is that another cafe in Greenville?

A. Yes, sir.

Q. Then where did you go?

A. First red light on the Washington highway.

Q. Where were you headed?

A. Headed home then. We stood there.

Q. Was it light or dark?

A. Dark. Me and Bennie decided to walk home. We couldn't get a ride. A man passed us, Mr. Tom Elks. We



knew him. He didn't stop to pick us up. We walked to Central cross. A man passed us on a big pickup truck and we thumbed. He stops and we jumps on the back of the truck. He told us when we got home (p. 120) to tap on the cab of the truck so he would know we wanted to get off. When I got home I knocked on the top of the truck and he slowed down and me and Bennie jumped off and run in the house and my mother saw I had some blood on me and she went to crying and asked me what happened. I told her I got in a fight in Greenville. She asked me did anybody get killed. I told her no. We stayed there three or four minutes I imagine and I pulled my clothes off and washed my hand and we laid down. My mother come in and asked me was the store open up there. I told her yes. She asked me would I mind going and gettin her a box of snuff and bottle of drink and me and Bennie and my sister Myrtle Ruthi's boy went to the store and got some drinks and snuff and come back home.

Q. Did you stay home the next day:

A. Yes, sir. I got up and washing and took a shower, put on some clothes and was going over the river to see my girl at a place called Stokes. I caught the one o'clock bus, me and Bennie, me and Bennie and my sister caught the bus. She won't going to town, she was going to the cafe. I was goin over the river to my girl friend's. When I caught the bus I asked the man what time the bus left Stokes and he said about five o'clock that evenin.

Q. What time was that when you asked him?

A. Two or three minutes after one o'clock.

Q. Was that in the afternoon?

(p. 121) A. Yes, sir. After I asked him what time the bus going to Stokes he said five o'clock.

Q. Where did you go after you left the bus station?

A. Went to Bennie's first cousin's.

Q. Then what happened?

A. Nothing, we just stayed there and talked.

[fol. 21] Q. What if anything was said?

A. Just sit there and laughed and talked.

Q. Then what did you do?

A. I walked down to my sister's house. Me and Bennie decided to walk there and my sister wern't home. Me and

Bennie went in the house and set down. Not so long after we got there my sister and her boy friend and another man come there and they went upstairs. Me and Bennie went upstairs. This boy called Bennie downstairs and told Bennie about some white fellows looking for us to kill us. He said "For what?" Bennie said he didn't po nethin about it. Bennie called me downstairs and told me about it. I told Bennie, "Nobody ain't going to kill me. I ain't killed nobody." He said, "I know you ain't killed nobody but you better get out of town." Me and Bennie walked on down the railroad and stopped in the woods and set down on the railroad crossing. I asked Bennie what he wanted to kill us for and Bennie said he didn't know. I told Bennie, "I know one thing, I know I didn't kill nobody. I ain't goin to try to get away. I promised my mother I was goin to (p. 123) Stokes." He said, "I know you ain't killed nobody but they lookin for you to kill you."

Q. Did you leave the railroad track?

A. Yes, sir.

Q. Where did you go?

A. To my sister's house.

Q. From there where did you go?

A. To Stokes.

Q. How did you get to Stokes?

A. On the bus.

Q. Go to the bus station?

A. Yes, sir.

Q. Who did you see at the bus station?

A. Some law.

Q. You mean police?

A. Yes, sir.

Q. Did they see you?

A. Yes, sir.

Q. Then you took the bus and went to Stokes?

A. Yes, sir.

Q. Were you at Stokes at your girl friend's house when the police officers came and picked you up?

A. Yes, sir.

Q. You know who they were?

A. I know some of them but not all.

(p. 123) Q. Had you at any time seen any of them before that night?

A. No, sir.

Q. You know whether either one of them was the Sheriff of the County?

A. Yes, sir.

Q. What time of night did they come there?

A. Pretty good and late. I didn't have no time.

Q. Had it been dark long?

A. Pretty good while.

Q. Where were you when they came to the house?

A. I was laying down.

[fol. 22] Q. Tell His Honor what if anything they said from the time they came?

A. When he come there he come in the house and asked me my name and I told him.

Q. How many were there?

A. Three come in the house and the rest stayed out doors. Asked me my name. I told them. Told me to get up. I got up and he asked me to get my hat and I got my hat. He said he was going to handcuff me. I asked him for what.

The Court: Can you identify the ones that came there?

A. Yes, sir.

The Court: Are the three persons who went there here? Sheriff Tyson, stand up. Deputy Sheriff Manning and Mr. Gibbs.

(p. 124) A. I know the one with glasses on, (Referring to Sheriff Tyson), and the one on the right.

The Court: How about the one in the middle?

A. He was driving and I asked him what he was getting me for.

Q. Asked which one?

A. Mr. Gibbs. He told me to wait and I would see. He handcuffed me and pushed me outdoors and there was a whole lot of more laws come from around the house. They searched me and asked me where Bennie was. I told him I didn't know. He asked me two or three times and carried me and put me in the car. Three officers got in the car with me and the rest come in cars and they went on down and cranked up.

Q. At the time they arrested you did you see a warrant or anything?

A. No, sir. When I got in the car I asked them again what did they have me for. Mr. Gibbs said, "Wait and you will find out." I sat there. They cranked the car and went on down the dirt road and stopped.

Q. How close was this car parked to the house when they picked you up? Was it right in front of the house?

A. No, sir.

Q. How far was it from the house?

A. I couldn't tell. We went across a field to get to the car.

Q. At the time you went across the field who was with you?

(p. 125) A. Mr. Gibbs and the rest of the two officers.

Q. Was it dark?

A. Yes, sir.

Q. Were you handcuffed?

A. Yes, sir. They stopped the car through the woods on the dirt road. I asked them what they stopped for. They told me they wanted me to talk some. I asked them, "Talk about what?" They said, "We want you to tell about killing that man." I told him I didn't kill no man. He asked me where I was that Saturday night. I told him I where I was and Mr. Gibbs said that won't so, said I was lying. He said he wanted me to tell him I killed that man. I told him I didn't kill that man, didn't know nothin about it. He said, "You just as well tell me because if you don't we will kill you." Mr. Gibbs said he would kill me. I said, "I didn't kill him." He said, "You are lying." I didn't say anything more to him because he started cussing and he turned around and put his hand on his pistol.

Q. Did you see him put his hand on the pistol?

A. Yes, sir.

[fol. 23] Objection by Respondent to leading questions.

The Court: I think at this time counsel should be very careful not to suggest.

(Answer continued): When he turned around and put his hand on his pistol I asked him what he was going to do and he said if (p. 126) I didn't tell him I killed the man he was going to kill me and he said I would never see my mother again and he really scared me, that is the truth. I thought he would because he said he would.



Q. Was the car moving along at that time?

A. No, sir, it was stopped.

Q. Where was the Sheriff and Mr. Manning?

A. Settin in the front. He said if I didn't tell him I killed this man he was goin to kill me and I would never see my mother again. After he told me that I just knowed he would, and I was afraid and I told him, "Yes, sir, I killed him" and he said that was all he wanted. After I told him I killed him he wrote down a whole lot of more stuff. I couldn't read and I didn't know what he wrote down.

The Court: Was that on the car?

A. Yes, sir. After he wrote it then they cranked up the car and got on the highway going to Williamston. They said the car broke down. I don't know what got wrong with the car but they stopped again on the highway and called up Williamston to call the patrolman to come and get them. After they got to Williamston they asked the rest of the two officers to sign the statement and they said to wait, that they would do that later.

The Court: Did you sign the statement?

A. No, sir.

(p. 127) The Court: I understood you to say Mr. Gibbs suggested that the other two sign the statement?

A. That's right.

The Court: Mr. Gibbs had written out a statement and he suggested that they sign it?

A. Mr. Gibbs asked the rest of the officers to sign it and they said they would sign it later on.

The Court: You hadn't signed it?

A. No, sir.

The Court: Could you write?

A. I can write now but I couldn't write my name then. Then he put me in jail and I asked could I see my mother and they told me no, I wouldn't live long enough to see my mother.

Direct examination (continued):

Q. Who said that?

A. Mr. Gibbs was the one talking. I didn't say nothin more. The next Monday night they come back and I just knowed they come back to finish me because they told me

they was coming back and finish me up. When they come back they took me out of the cell block downstairs and a whole lot more officers there.

Q. You know how many were there?

A. I couldn't exactly give you all the names because I didn't know them. They told me they wanted to get another statement. (p. 128) I asked them for what. He said, "You give me one last night and I want another one."

Q. Was that in jail?

A. No, sir, this was down in the office.

[fol. 24]. Q. They had taken you out of the cell?

A. Yes, sir, in (some kind of office. I told them I didn't know nothin about it. They said, "You witnessed it one time and you just as well witness it again." He asked me what did I kill him for. I told him I couldn't tell him nothin because I didn't know.

Q. Who asked you that?

A. Mr. Gibbs.

Q. He was there Monday night?

A. Yes, sir.

The Court: Is Mr. Gibbs a deputy sheriff?

Mr. Moody: He is S. B. I. agent but at that time he was state highway patrolman.

He asked me what did I kill him for. I couldn't tell him what I killed him for because I didn't know what to tell him. They went on and wrote a statement down. I couldn't tell what they wrote because I couldn't read it. That boy, he was writing on a piece of paper.

The Court: What is his name?

Mr. Taylor: Arnold, police clerk.

After he wrote it down—

(p. 129) Q. How did he write it?

A. He wrote it on a piece of paper first and then went to the typewriter and wrote it on the typewriter. After he wrote it he told me to sign my name to it. I told him I couldn't write. He told me to make a cross mark. I asked him, "What you want me to make a cross mark for?" He said, "You can make a cross mark." I went on and made a cross mark. He asked me did I know anything about Bennie.

I told him I didn't know where Bennie was. After awhile they brought Bennie in there.

Q. How long had they had you downstairs?

A. As close as I can guess at it hour or hour and a half.

Q. They ask you any questions at that time?

Objection by Respondent.

Q. What were you doing during the hour they had you down there?

A. I was just settin there.

Q. What were they doing?

A. They were making confession. I was just settin there.

Q. Were they talking to you at the time?

A. Yes, sir, once in a while they said somethin to me. But the words they asked me I couldn't answer them back; couldn't answer the questions back because I didn't know. Then he carried me out of that room and carried me in a separate room by myself. Then they took Bennie in there and questioned him.

Q. What, if anything, did they do to you after that?

A. They didn't do nothin else to me. After the fellow typed (p. 130) it down, the sheriff I think, I signed my name to it, that cross mark, then he turned around and read it to me.

The Court: Who did the reading?

A. One of the officers. I don't know who but I didn't know what he was reading. All I know he was reading.

The Court: You couldn't understand?

A. No, sir.

The Court: Why? — He was readin so fast I couldn't understand. All of them readin some papers.

[fol. 25] Mr. Taylor: We requested the Court to bring into Court a copy of the alleged confessions that was signed. We would like to have them.

Sheriff Tyson: They have been in possession of the Clerk of the Court. (Hands papers to counsel.)

The Court: Are they the originals?

Sheriff Tyson: Yes, sir.

Q. If you can recall, is this the paper on which you made that cross mark?

A. I don't see no cross mark.

Q. Right here?

A. Yes, sir, I think so.

Q. Is this the one you put the cross mark on in Williamston?

A. Yes, sir.

Q. I show you two sheets of paper. Have you seen these before?

The Court: Were they produced by Sheriff Tyson?

Mr. Taylor: Yes, sir.

(p. 131) A. Yes, sir, these are the two he wrote in the car when it stopped.

Q. Did you ever put a cross mark on that?

A. No, sir, I didn't.

Q. You state that after you put the cross mark on it they read it to you?

A. Yes, sir.

Q. Could you understand what they read to you?

A. No, sir, they were reading so fast.

(p. 132) Q. You say after they finished with you they took you into another room?

A. Yes, sir.

Q. What happened to you?

A. They didn't talk to me no more. The fellow typewrote it and told me to sign it. When I signed it they got through talking to Bennie and brought us to Raleigh.

Q. Where did they carry you in Raleigh?

A. Put us on death row.

Q. Were you ever brought back to Pitt County?

A. Yes, sir, we was brought back there.

Q. You know when you were brought back to Pitt County after you were carried to Raleigh from Williamston?

A. They carried us back to Greenville.

Q. How soon was that after you were taken to Raleigh?

A. My best understanding about two months.

Q. At that time had any of your people come to visit you?

A. No, sir.

The Court: When did the homicide occur?



Mr. Moody: The bill charges the 5 of February.  
(p.133). The Court: The trial occurred in May?

Mr. Moody: Yes, sir, May 30th.

Q. You say you stayed in Raleigh about two months?

A. Yes, sir.

Q. You know whether or not your people knew where you were?

A. No, sir, I know they didn't know.

Q. Had you seen any of your home folks in that length of time?

[fol. 26] A. No, sir.

Q. Floyd, you say at the time you were picked up three officers came and picked you up whom you identified?

A. Yes, sir.

Q. You know how many other officers were out doors?

A. I can give you my best estimate.

Q. What is your best estimate?

A. About nine or ten.

The Court: In addition to the three that came in?

A. Yes, sir.

Q. Which, if any, of the officers had guns or weapons on them?

A. I saw Mr. Gibb's gun.

Q. Did you see any other officers with guns?

A. Well, or, if I had I don't recall it now. I don't remember seeing anybody with a gun but Mr. Gibbs.

(p. 134) Q. How did you manage to see Mr. Gibbs' gun?

A. After he stopped the car he said he was going to kill me and I saw it then.

Q. At the time you marked this "X" on the confession you say they wrote up in Williamston before that time had they ever advised you of any of your rights?

A. I don't understand.

Q. That is your right not to sign it?

A. No, sir, they didn't advise me nothin.

Q. I think you stated after you signed the confession they read it to you?

A. Yes, sir.

Q. You know how many officers were present at the time they read it to you?

A. There was more than two or three in there. I didn't count them.

Q. I think you said you didn't understand what they read to you?

A. No, sir. They read it so fast I didn't understand it.

Redirect.

(p. 153) Questions by the Court:

Q. When you were in jail at Williamston did you make request to see your mother?

(p. 154) A. Yes, sir. I asked Mr. Gibbs could I see my mother the same night he arrested me.

Q. Were you in Williamston jail?

A. Yes, sir.

Q. What did he say?

A. He told me no.

Q. He didn't say anything about killing you?

A. No, sir, he pushed me in jail.

Q. He didn't say anything about killing you then?

A. No sir.

Q. But he had said that before?

A. Yes, sir.

BENNIE DANIELS, being first duly sworn, testified as follows:

Direct examination.

By Mr. Taylor:

Q. What is your name?

A. Bennie Daniels.

Q. Where were you living at the time this thing is supposed to happen?

[fol. 27] A. In Pitt County.

Q. Where?

A. I was living close around Winterville, between Winterville and Greenville.

Q. With whom were you living?

A. My father and mother.

(p. 155) Q. Do you have any brothers and sisters?

A. Yes, sir.

Q. How many?

A. I have three brothers and six sisters.

Q. What type of work do you and your family do?

A. Work on the farm.

Q. Do you own the farm?

A. No, sir.

Q. Running it on sharecropping basis?

A. My father were.

Q. You were working with your father?

A. Yes, sir.

Q. How old were you at the time this thing is supposed to have happened?

A. I really don't know.

Q. You don't know when you were born?

A. No, sir.

Q. Have you had any schooling at all?

A. I think I went to school I guess as far as the second grade, first or second grade.

Q. You haven't had any schooling beyond that?

A. No, sir.

Q. When were you picked up by the police?

A. I was picked upon on Monday night I think it was.

The Court: What day of the week was it the homicide occurred?

(p. 156) Mr. Taylor: Saturday night.

The Court: And this was the following Monday?

The Witness: Yes, sir.

Q. You know what time of night it was they arrested you?

A. No, sir, I really don't know.

Q. Was it dark?

A. Yes, sir, it was dark.

Q. Lloyd Ray testified that on Sunday you and he went to the railroad track?

A. Yes, sir.

Q. Did you and he part at that time?

A. Yes, sir.

Q. Where did you go after you left him?

A. I was there about five minutes, walked in the woods, and he left me and come back to Greenville.

Q. What did you do after that?

A. I was in the woods until it got dark and when it got dark I come back to Greenville to my cousin's house.

Q. Did you see anyone?

A. Yes, sir, some people.

Q. Who did you see?

A. You mean before I got to her house?

Q. Anybody you saw going by?

A. I won't say I saw anybody. I knew.

Q. What happened after you got to your cousin's house?

(p. 157) A. I took and told her about what I have heard and people looking for me for and what they said they going to do to me if they see me.

[fol. 28] Q. What was that?

A. I told her when me and Lloyd Ray went to his sister's house his sister come there and another fellow come with them and telling me about he had heard some white men looking for us, going to kill us, that we had killed a white taxi driver, asked me did I know anything about it and I told him no. Asked me where was I that Saturday night, did I get in any trouble. I told him I got in trouble at Bonner Lane. He said this was about a white man. I said, "I don't know nothin about it." He said, "Some white men looking for you all for killing a taxi driver", and I told Lloyd Ray about it.

Q. You were telling your cousin about it?

A. Yes, sir.

Q. After you left her where did you go?

A. To my home.

Q. What did you do?

A. I walked in the house. My mother was crying. Began asking me did I know anything about this man. I told her I didn't know nothing about it. She said the law had been there lookin for me.

Q. What else happened?

A. She asked me where was I at that Saturday night and what (p. 158) kind of trouble had I got in. I told her me and Lloyd Ray got in a fight in Greenville.



Q. What did you tell her?

A. Told her we got in a fight with some boys in Bonner Lane. Then she asked me did I know anything about this fellow. I told her no I didn't know anything about it. She said the law had been there looking for me for killing a white fellow. They was crying and disgusted I guess—

Q. What?

A. Sorry I guess. After I got home we talked about it. I told them where I had been and what trouble I got in and where I stayed, didn't know nothing about this man the people was looking for me for, accusing me. I stayed home an hour or two hours talking and we took and laid down. The next day was Monday. We took and talked about it that day. That Monday evening around about five o'clock, I don't know what time it was—

Q. Did the officers come to your house?

A. Between Sunday night and Monday night.

Q. Yes.

A. No. That Monday evening I think it was I sat around until about five o'clock some people passed my house, car load of white men. They was riding right slow looking towards the house we lived in. I told my people about it. They had already heard about some men looking for us because I guess if (p. 159) was nearly everywhere around there. She told me she was afraid it was people looking for us to kill me and she told me better for me not to stay there but leave and go to a man's house that liv'd near us. I left and went to this man's house.

Q. You know who he was?

A. I wouldn't say but I think his name was John.

Q. He lived in the same neighborhood you lived?

A. Yes, sir. After I got to his house I guess I stayed there around twenty minutes talking to him. He had heard about the same thing that they had seused me of. He asked me did I know anything about this man. I told him no, sir; that I had got in trouble but not with this white man. I guess he must have got afraid for me to stay to his house. He told me another man's house to go to and I done like he told me. I got there—

Q. Was that day or night?

A. Night time.

[fol. 29] Q. Was it dark?

A. Yes, sir. I went to this man's house and told him who sent me to his house. I didn't know him.

Q. You know his name?

A. No, sir. I had never been to his house before. After I got to his house I told him the man had sent me, this fellow John I think his name was, and why he sent me. I don't know what time it was I got to his house, around about nine or (p. 160) ten o'clock but we took and went to bed. Some time that night the law come to that house where I was so I was in one room and the man and lady lived to the house, they in one room and I in another. I had pulled my clothes off and was in bed when the law come to this man's house and come in the room they was in.

Q. You know who the police were?

A. Yes, sir, I think I know some of them.

Q. You know their names and know them if you saw them again?

A. Yes, sir.

The Court: Who were the officers who went to this home and arrested him?

Sheriff Tyson: Mr. Gibbs and Mr. Dorsey.

Q. Are they the men?

A. Yes, sir. So they come in the house and I heard him answer this fellow had anybody been to his house that night and he told them n- nobody been there. Might have been one or two minutes before the law walked where I was. I was putting on my clothes. The Sheriff come in there and had a freshlight in his hand. He told me to take my clothes out and come in the other room. I did and Mr. Gibbs handed me and caught me in my belt. Another one had me on each side, and carried me to the car.

Q. They tell you what they had you for?

A. No, sir. So they carried me to the car.

(p. 161) Q. Did they tell you what they had you for?

A. No, sir. So they carried me to the car.

Q. Did you see them with guns?

A. I see that Mr. Gibbs. He was just like that man. The rest of them had on clothes like you all dressed.

Q. What kind of clothes did Mr. Gibbs have on?

A. Like that man. (Indicating.)

Q. State highway patrolman clothes?

A. Yes, sir. I got in the back of the car. Two of them got in the back with me. They come right by my house. He told them to stop and tell my brother to tell my father they had caught me. They got to Greenville, changed cars and got in a highway patrolman's car and carried me to Williamston that same Monday night.

Q. Told your brother to tell your father they had got you?

A. Yes, sir.

Q. You know whether they told your brother to tell your father where they were taking you?

A. No, sir. They carried me to Greenville and changed cars, got on another car and carried me to Williamston. Took and searched me and took and locked me up. That was on that Monday night. The next night I think it was the come back over there. I was in a cell there. Three or four of the law come in the cell where I was.

Q. You know who they were?

A. Yes, sir, Sheriff and highway patrolman and the jailor. They (p. 162) come there and asked me did I kill this fellow or what did I know about it.

[fol. 30] The Court: Would you know the jailor in Williamston if you saw him?

A. No, sir. This was the first time I saw him.

Q. Is he the man that locked you up?

A. Yes, sir.

Q. How you know he was the jailor?

A. Because he locked me up and he had a pistol. They called him jailor. They come there the next night and asked me, wanted me to tell them about this man. I told them I didn't know nothing about this man. They began asking me where I was that Saturday night, where did I go and where did I stay.

Q. Who was asking you those questions?

A. It was the Sheriff. It was another man and after I answered where did I go I started to tell them where I met Lloyd Ray and where I stayed that Sunday night. They didn't want to hear so much. They wanted me to tell them about this man.

Q. What man?

A. The man they seusing we had killed. I told them I didn't know nothin to tell them. There was another man there, I don't know who. He said I did know and he said if I didn't tell them he was going to kill me.

Q. Who said that?

(p. 163) A. The law, I reckon. He had on a pistol.

Q. Where were you?

A. In the cell. He said if I didn't tell him about this man he was goin to kill me. I told him where I went that Saturday night and what happened and he took and hit me side of the face and knocked me down and I started cryin.

Q. He did what?

A. Hit me side of the head.

Q. Who?

A. I don't know who he was.

The Court: How many were there?

A. I don't know, sir.

The Court: Were they in the cell with you?

A. Three in the cell with me.

The Court: Were there other prisoners in the jail?

A. Yes, sir.

The Court: There were other prisoners in jail in the cell block but none in the cell with you?

A. No, sir.

Q. And three officers were in there?

A. Yes, sir.

Q. One of those is the one who struck you side of the head?

A. Yes, sir.

Q. Would you know him?

A. Yes, sir. I don't know whether he was officer or not.

(p. 164) Q. Would you recognize him?

A. Yes, sir. I would know his favor because sometime the law has pistol and you don't know whether he is the law or not.

The Court: Mr. Moody, your testimony would be to the effect that the officers talked to him in the jail?

Mr. Moody: Yes, sir, but didn't strike him.

The Court: Are the officers here?



Mr. Moody: All that we know anything about who were down there.

The Court: Will you have them stand?

[fol. 31] At the request of the Court the following persons stand: R. W. Tyson, L. E. Manning, S. G. Gibbs, S. B. Lorsey, L. D. Page and R. A. Peel.

The Court: Look at those carefully.

The Witness: That man yonder.

The Court: That is Mr. Page. He is the man who struck you and knocked you against the cell or bars, side of the cell?

The Witness: Yes.

Q. Go ahead.

A. After they threatened killing me, after he hit me it scared me so bad I really was scared the was going to kill me if I didn't tell them what they wanted to. So I started telling them the way I met Lloyd Ray, the way we went. Tried to tell him where we met and where we went and what happened. That man yonder took and went out.

(p. 165) Q. Mr. Page?

A. Yes, sir, and he come back in there with a little cripple fellow. He hopped.

Q. Is that the gentleman, Mr. Arnold?

A. Yes, sir. They come back and had a whole lot of writing on paper and tole me Lloyd Ray said this way and this way and told me to witness it and I said yes, sir, and they brought me to another cell. After a while they brought Lloyd Ray in the cell where I was and that man yonder—

Q. With the red tie, Mr. Arnold?

A. Yes, sir, they come back in there and a whole lot of stuff written on a paper, said Lloyd Ray said this way and witness here and I did and said Lloyd Ray said it and asked me was it true and I told him yes. I was already nervous. They had threatened me and hit me. They took me and brought me in another cell. I was there about five or eight minutes. They brought Lloyd Ray in there. Both of us set down. They read the confession to us, asked me to sign it. I told him I couldn't sign, the sheriff done signed mine and they said "This will be held in court against you all."

Q. Had they told you of any rights you had under the law not to say anything before they brought it in there?

A. No, sir. The Sheriff said, "You boys remember this will be held in court against you all." They didn't question us no more but took us then and brought us in to Raleigh.

(p. 166) Q. At the time they picked you up did they have a warrant for your arrest?

A. No, sir. Didn't read nothin to me. Just grabbed me and handcuffed me and brought me on.

The Court: What will the respondent's testimony show as to the issuance of a warrant?

Mr. Moody: I don't think we had a warrant at the time. We have a contention about that. The record shows issued on the 8 of February. I think they were talking to them on the 6th.

The Court: The warrant was issued on the following Thursday?

Mr. Peters: Tuesday was the 8th. The warrant shows the crime was committed on or about the 5 of February, which was on a Saturday. Monday was the 7th and Tuesday the 8th, when the warrant was issued.

The Court: Can it be agreed as to when this prisoner and the other were interviewed and when the questioned confession was made?

Mr. Moody: My contention is that it was Tuesday night. [fol. 32] The Court: After the warrant was issued?

Mr. Moody: I don't think the warrant was issued until after they talked to them.

The Court: Warrants issued after confessions were made. Was there any warrant when Lloyd Ray was arrested or when he made the confession?

(p. 167) Sheriff Tyson: Both confessions made Tuesday night.

The Court: Was that before or after the warrant?

Sheriff Tyson: I couldn't say until after I see the warrant.

The Court: It bears date February 8th.

Sheriff Tyson: February 8 is the night of the confession.

The Court: I think it may be a very critical question. I think it important that it be cleared up. Do you think your evidence would clear it up?

Mr. Moody: I don't know.

Q. Was any warrant ever read to you?

A. No, sir.

Mr. Taylor: I would like to ask if respondent would concede the fact that there was no warrant issued at the time of the arrest.

The Court: Certainly when taken into custody that was an arrest. Now when that happens it appears no warrant had issued.

Mr. Moody: Yes, sir, but we have the North Carolina statute.

The Court: I don't think that determines the question. But that is certainly a thing that ought to be in the record. Respondent concedes that when each of the petitioners were arrested no warrant had been issued.

The Court: I understood Sheriff Tyson to say "When we picked them up we had no warrant?"

(p. 168) Mr. Moody: I think that is correct.

The Court: When petitioners were taken into custody, prior to the time they were taken into custody and arrest no warrant had been issued.

#### Re-direct examination:

(p. 178) The Court: He has already said that. Does your evidence tend to show that Bennie signed it?

Mr. Moody: Yes, sir, that he signed it. There was introduced in evidence identification of his fingerprints made at previous time and the officer testified that Bennie signed that card at the same time and that was his signature and as I remember that was compared in court with his signature.

The Court: There was a statement signed by Lloyd Ray to which he made his mark, and one for Bennie which your evidence tends to show he signed himself?

Mr. Moody: Yes, sir.

The Court: They are both in the record?

Mr. Moody: Yes, sir.

(p. 179) Mr. Taylor: I assume that the alleged confession of Bennie is in the record.

Mr. Moody: Yes.

Mr. Taylor: I would like to know if the same is true as to Bennie, that no warrant issued at the time of the arrest.

Mr. Moody: Oh, yes.

The Court: At the time he was taken in custody.

Mr. Taylor: They were arrested without a warrant.

[fol. 33] ; DR. IRA C. LONG, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Taylor:

Q. Do you hold any position with the State of North Carolina?

A. Yes, Superintendent of the State Hospital at Goldsboro.

Q. What type of institution?

A. For the insane.

Q. Maintained exclusively for negroes?

A. Yes, sir.

Q. How long have you held that position?

A. A little over four years.

Q. You were holding that position in February, 1949?

A. Yes.

Q. Did you ever have occasion to examine Lloyd Ray Daniels and Bennie Daniels?

A. Yes.

Q. Will you state to His Honor the circumstances under which that happened?

A. Bennie Daniels had the mentality of a high-grade moron.

Objection by respondent.

Mr. Moody: They didn't set that up at the time of the trial.

The Court: I think the better course is to go the way we are going. I think age, mental capacity both probably would be competent.



Mr. Taylor: It is introduced only on the theory of the confessions.

The objection is overruled.

(Answer continued): Lloyd Ray Daniels had mentality of a normal, dull normal.

Q. Did you give the finding with respect to Bennie Daniels?

A. High-grade moron. Lloyd Ray Daniels had IQ of about 80 and would be classified as normal, dull normal.

Q. How did you test that?

A. Wellsley Bellevue & Rhoshock.

(p. 184) The petitioners rest on the confession phase of the case.

Respondent renews objection to all testimony having to do with bearing on the questioned confessions and moves to strike from the record all evidence of this nature. The objection is overruled and the motion is denied.

#### Respondant's Evidence in re Confessions

Sheriff RUEL W. TYSON, being first duly sworn, testified:

Direct examination.

By Mr. Bundy:

Q. You are Ruel W. Tyson, Sheriff of Pitt County?

A. Yes, sir.

Q. Do you remember the arrest of these two petitioners?

(p. 185) A. Yes, sir.

Q. Were you present when Lloyd Ray was arrested?

[fol. 34] A. Yes, sir, I was.

Q. He was the first one arrested?

A. Yes, sir.

Q. When and where was Lloyd Ray arrested?

A. Lloyd Ray was arrested on Sunday night between one and one-thirty on the L. C. Whitehurst farm in the Stokes section of Pitt County.

Q. Did you go to the house yourself where he was found?

A. Yes, sir, I did.

Q. In company with whom?

A. In company with Deputy Sheriff Manning, Deputy Sheriff Mills, Al. Dorsey, M. M. Corbett, police officer, and S. G. Gibbs, who was patrolman at that time.

Q. All of you go to the house at the time?

(p. 186) A. Yes, sir.

Q. Where did you find Lloyd Ray Daniels?

A. In this house, tenant house.

Q. Where in the house?

A. He was lying on a bed or couch one, I don't know which.

Q. Dressed or undressed?

A. He was fully dressed.

Q. What time was that?

A. Between one and one-thirty.

Q. Was he taken in custody at that time?

A. Yes, he was.

Q. Where did you take him then?

A. We parked our car in Mr. Whitehurst's yard.

Q. The owner of the farm?

A. Yes, sir, in his yard. We walked approximately a mile to this tenant house. After Lloyd Ray was arrested he was taken back to the car which was in Mr. Whitehurst's yard.

Q. Did you go from Mr. Whitehurst's home to this house where he was found by road or path?

A. By farm path.

Q. Cross any field?

A. I think the most of this path runs through the field. I don't recall whether any woods in there or not. Majority of it is in the field.

Q. Anything happen in respect to his making any statement on (p. 187) the way to the car?

A. I don't think he made any statement until we got to the car.

By the Court:

Q. Did you go in the house?

A. Yes, sir.

Q. Remember what was said in the house?

A. I told him he was under a rest. He wanted to know what for. I told him for the murder of Benjamin O'Neal.

Q. State what was said on the way to the car about any statement he might make?

A. I don't think anything said about any statement until after we got in the car.

Q. What was said then, if anything?

A. After he was put in the car with Mr. Manning, Mr. Gibbs and myself. Lloyd Ray on the back seat and Mr. Gibbs on the back seat. I was on the front seat, right hand side. Mr. Manning was driving. On the way to Williamston we talked to him some. I did some of the questioning and Mr. Gibbs did some. I don't think Mr. Manning did. We hadn't got very far from where he was arrested before [fol. 35] he began to tell us about the crime and how it was committed and all about it.

Q. Did anybody offer him any violence?

A. No, sir.

Q. Anybody attempt to?

(p. 188) A. No, sir.

Q. Anybody make any threats?

A. No, sir.

Q. Anybody offer him any inducement?

A. No, sir.

Q. State whether or not he was warned or anything said to him with respect to what he said would be used against him?

A. Yes, sir, I warned him and told him he didn't have to make a statement, that any statement he did make would be used against him in court.

Q. When was that?

A. After he got in the car.

Q. Was that before he made any statement?

A. Yes, sir.

(Direct examination resumed.)

Q. You say it was shortly after you pulled off in the car?

A. Yes, sir, after we got him in the car. I think that's correct.

Q. How long after that before he told you about it?

A. I couldn't say exactly how long. I say not but a very few minutes.

Q. State what he told you?

A. I don't know as I could state it word for word unless I could refer to the statement.

(p. 189) The Court: Tell us the best you can.

A. Lloyd Ray said he and Bennie were in Greenville together, had drank some whiskey, had been on Bonfler Lane and gotten in a fight with some men and that he had cut this men and that he had cut this man and he had some blood on his clothes.

Q. Which one?

A. Lloyd Ray, and that they left down there and come to the bus station. The bus hadn't come. They decided to get a taxi. They got a taxi to take them home. Left Greenville, went out 264 towards Washington, turned off of the highway up a dirt road. This road leads North from the highway. Went down the dirt road. He said Bennie told the taxi driver to turn up in the barn yard, that they couldn't turn beyond the barnyard for the road was bad. They turned up into the barnyard and Bennie held a knife around O'Neal's neck.

Q. They didn't call his name, did they?

A. I believe they called him taxi driver. I am not positive. And he took his money out of his pocket.

Q. Did he say where each were sitting, front or back?

A. I believe he said he was sitting side of O'Neal and Bennie in the back, behind. I believe that is correct. And they got out of the car. Said O'Neil had a knife. They got in a fight and tussel, fought some on the ground and got in the tobacco barn and had quite a scuffle there and come out (p. 190) of the barn and had quite a scuffle. That they knew when they left him he was dead.

Q. Did he say why they assaulted him?

A. He said they assaulted him to get what money he had.

Q. Was there any reluctance on the part of Lloyd Ray to make that statement?

A. No, sir. After he started talking he talked as freely as anyone I ever talked to.

[fol. 36] Q. It has been said by him that the car stopped en route to Williamston?

A. The car stopped. I believe, after we got to Robersonville. Broke down.

Q. He testified it stopped two times?



A. No, sir. Stopped when it broke down.

Q. Any of you get out of the car there?

A. After the car stopped on us Mr. Manning and I both got out of the car. Lloyd Ray and Mr. Gibbs still in the back. I called by radio and had a car from Williamston to come and pick us up.

Q. While you were stopped there was any pistol brought into play?

A. No, sir. There was no pistol brought into play. I had my pistol on but under my coat and under my overcoat. Lloyd Ray didn't see my pistol.

Q. You know whether Mr. Gibbs had on one or not?

(p. 191) A. I didn't see Mr. Gibbs' pistol but I imagine he had one.

Q. Was it the following night that you went back to Williamston where the statement was made by both of them?

A. We went back on Tuesday.

Q. Were you present when Bennie was arrested?

A. Yes, sir.

Q. Where was that?

A. Bennie was arrested approximately a mile or two East of Winterville on Bryant Tripp's farm at the home of Moore around five o'clock in the morning, Tuesday morning. I went in the house and when I got in the house there was a man in the first room that I entered. I went in the room to the right and Bennie was standing behind the door fully dressed with his hat on.

Q. What did you do with him?

A. Put him under arrest. Told him he was arrested for the murder of Benjamin O'Neal. We took Bennie to Greenville, changed cars and took him to Williamston, Mr. Ray Smith, Gibbs and Dorsey. Mr. Ray Smith was a fireman. He was driving my car for me.

Q. Did Bennie make any statement en route to Williamston?

A. Yes, sir, he did.

Q. Who was in the car that he rode to Williamston in?

A. Gibbs, Dorsey, Smith and I.

Q. State whether any threat or attempted violence was used on him?

(p. 192) A. No, sir. There was no threats or violence of any kind.

Q. Any inducement?

A. No, sir.

Q. Hope of reward?

A. No, sir.

Q. Was he told it would be easy on him?

A. No, sir.

Q. What was he told?

A. I warned him he didn't have to make a statement unless he wanted to and whatever statement he did make would be used against him in court.

Q. Was this said while traveling on the way to Williamston?

A. Yes, sir. When we arrested him I took him by not very far from where his father lived, took him by his father's home. Someone came to the door, I don't know whether his brother or father, and I told him we had Bennie under arrest.

[fol. 37] Q. Did Lloyd Ray's people know he was arrested?

A. I don't know. I hadn't seen his people.

Q. What did Bennie say on the way to Williamston?

A. This might not be the exact words but he told us that he and Lloyd Ray had -otten a taxi in Greenville.

Q. He tell you anything about what had happened before they got the taxi?

A. Told us he had been to Bonner Lane and gotten in a fight there and come over there to the bus station and got a taxi to take them home. After they went out 264 several miles they (p. 193) went up this dirt road, then turned up the road, then drove up in the barn yard and that the threw a knife on O'Neal and Lloyd Ray put his belt around O'Neal's hands, that they got out of the car. Bennie said he pulled O'Neal out of the car and Lloyd Ray got out of the car under the steering wheel and they had quite a tussel on the ground and into the tobacco barn. I asked him if he cut O'Neal. He said he didn't know, that they were in the tobacco barn in the dark and he didn't know whether he cut him or not. But he said he hit him one time with a brick and one time with a railing that came off of a tobacco truck and also hit him with some tobacco sticks.

Q. Was there a belt found at the scene?

A. There was.

Q. Getting up to the night the written statements were made, The Jail in Williamston is upstairs?

A. Yes, sir.

Q. Did you go up there with them to bring Bennie down?

A. No, sir, I didn't.

Q. One of them said you signed one of their names?

A. No, sir, I didn't.

The Court: I believe Lloyd Ray said the Sheriff made his mark. Didn't he say yesterday he made the mark himself?

Q. Did you write either one of their names or make either man's mark?

A. No, sir.

(p. 194) Q. The statement made in Williamston in the courthouse, were they together then?

A. Lloyd Ray was brought down from jail first and later Bennie was brought down. It was in Sheriff Roebuck's office in Williamston. Two rooms to the office. Partition door between the two rooms and this door was open between the two rooms.

Q. Why was the statement made there again?

A. To get it in writing.

Q. At that time was any inducement offered either or one of them to make a statement?

A. None whatsoever.

Q. Any threat or attempted violence?

A. There was not.

Q. Or hope of reward?

A. No, sir. Both talked just as freely all the way through about it.

Q. Did anybody slap anybody?

A. No, sir, Nobody did any cursing.

Q. Who took down their statements?

A. Mr. Arnold.

Q. He is clerk to the city police, or was at that time?

A. Yes, sir, file clerk I believe.

Q. What was done then with respect to the statements?

A. Mr. Arnold typed them.

[fol. 38] (p. 195) Q. Then what happened?

A. The statement was read to Lloyd Ray. Bennie was in the room when it was read. Lloyd Ray said he couldn't write. I believe Mr. Page wrote his name and Lloyd Ray touched the pen and made his mark. Bennie's was read to him. They were both asked if that was what happened. Both said it was. Then I asked them both if anybody had offered them any reward or promised them anything, or threatened them, or even cursed them. Both stated they had not been mistreated in any way, that the officers had been very nice to them all the way through.

Q. Did they remain there that night?

A. ~~After this was~~ done they were taken on a car by Deputy Sheriff Manning and Gibbs and taken to Raleigh.

Q. Did you go?

A. No, sir.

Q. At any subsequent time did you talk to either or both?

A. Before the September term of court Dorsey, Manning and I went to Raleigh, got Lloyd Ray and Bennie, and brought them to Wilson. On the way to Wilson I took the clothes they had in possession, had on the night it occurred, stopped on the side of the highway, took the clothes out. Each one pointed out which ones he had on, shirt, pants, etc., and both very freely admitted the crime that had been committed. Told us what had happened. Both cried about it. Said they were mighty sorry they were in it, that they would never have done it if they (p. 196) hadn't been drinking. Talked very freely about it.

Q. Make any statement at any other time in your presence?

A. I believe that is the last time I talked to them.

The Court: You brought them back from Raleigh to Wilson?

A. Yes, sir.

Q. On this trip down from Raleigh (was that when you were bringing them to court?

A. Yes, sir.

Q. To be arraigned?

A. Yes, sir.

Q. State whether or not any threat or violence or offer of violence or inducement was offered?



A. There was not.

Q. Were any questions asked or were those statements made voluntarily?

A. They were made freely and voluntarily. They talked about it very freely.

The Court: Was that Saturday night before they were put on trial?

A. This was on Sunday morning and Court was to open the following Monday.

The Court: Were they just arraigned then or tried?

A. They were brought down to be tried. They were arraigned and then I believe the Judge ordered them sent to Goldsboro.

(p. 197) The Court: And how long after that when they were tried?

A. First term of Court. I don't know whether March or April.

Q. The doctor said they were there with him I think thirty days?

A. Yes, sir.

Q. Went down under order of Judge Parker?

A. Yes, sir. They stayed in Goldsboro until the next term of court when I sent Manning and Dorsey to Goldsboro and they were brought back for trial.

Q. They had counsel when they were arraigned?

A. Yes, sir, the Court appointed Mr. Speight and Arthur Corey.

Q. They appeared for them by appointment of the Court?

A. Yes, sir, and taken after arraignment over to the jail and Mr. Speight and Mr. Corey both talked to them some time.

Q. Did Mr. Speight and Mr. Corey represent them at the trial?

A. No, sir.

Q. By whom were they represented?

A. Gates and Taylor.

(Direct examination resumed):

Q. At the Court's instance you brought them down and Messrs. Corey and Speight were appointed to represent

them. Did Messrs. Corey and Speight make recommendation that they be (p. 198) committed for investigation?

A. Yes, sir.

Q. That's the last time you had any conversation with them?

A. Yes, sir.

Q. State whether they ever said anything to you about an attorney or to see one?

A. No, sir, never did.

Q. Did you see them from the time they left Williamston that night until they were brought back to court?

A. No, sir, didn't see them until I went to Raleigh for them on Sunday before Court.

Q. Anything else pertaining to the confessions that I have failed to ask you?

A. That's all I recall.

(p. 201) Cross-examination of Sheriff Tyson.

By Mr. Gordon:

Q. You say this was brought to your attention at four or five in the afternoon on Sunday?

A. Yes, sir.

Q. And on the basis of that you went out to look for Lloyd Ray and Bennie?

A. Yes, sir.

Q. Did you obtain warrants before you saw Lloyd and Bennie?

A. No, sir.

(p. 202) Q. At the time you arrested Lloyd Ray will you tell us where your car was parked?

A. I was on Deputy Sheriff Manning's car. It was parked in Mr. L. O. Whitehurst's yard.

Q. Is there a road leading up to the yard where Lloyd Ray was found?

A. It was a path.

Q. Can you drive a car over that path?

A. Yes, sir.

Q. Did you drive up that path?

A. No, sir.

Q. How far did you park the car from the house?

A. Approximately a mile.

Q. Was it running?

A. No, sir.

[fol. 40] Q. You could have driven up that road?

A. Yes, if I had wanted to.

Q. You parked the car and walked the distance to the house?

A. Yes, sir.

(p. 205) Q. On the way to the car do you recall whether anybody else questioned Lloyd?

A. I don't recall.

Q. But you do recall that you warned him of his rights?

A. Yes, sir.

Q. Tell us exactly what you said?

A. I told him what he was arrested for, told him he didn't have to make a statement unless he wanted to.

Q. Tell him he had the right to see his lawyer or family?

A. No, sir he didn't request it.

Q. Did you tell him he had a right to see his family or counsel before he spoke to you?

A. He didn't ask me.

Q. Is there a prison in Greenville?

A. Yes, sir, there are two there.

Q. Is Greenville the capital of Pitt County?

A. County seat.

Q. How far was Lloyd Ray from Greenville at the time you arrested him?

A. I would say approximately seven miles.

Q. How far from where you arrested Lloyd to Williamston?

A. I would say approximately twenty-five to thirty.

(p. 206) Q. Will you tell us why you took Lloyd Ray to Williamston instead of Greenville?

A. Yes, feeling was running pretty high in Greenville. I didn't think it would be safe to bring him back to Greenville.

Q. Will you tell us what indications there were of this high feeling you are talking about?

A. I don't know that I could exactly explain it but I had several telephone calls about it might be dangerous for those boys to be brought back to Greenville.

Q. Will you tell us who made those telephone calls?

A. No, sir, I couldn't recall.

Q. About when can you tell us you learned about this high feeling?

A. How is that?

Q. Tell us about what time it was you learned of this high feeling?

A. I left Greenville around twelve o'clock and didn't get back there until between two and three o'clock in the afternoon and that is when I found it out.

Q. Did you hear anyone say if the boys were found they might be hurt?

A. I was advised from two or three telephone calls it wouldn't be safe to bring them back through Greenville. I did this for their own protection. Felt it my duty to protect them.

(p. 208) Q. At the time you arrested Lloyd Ray were you armed?

A. Yes, sir.

Q. Were the other men with you armed?

A. I didn't see their guns but I am sure they were.

Q. You obtained this statement, you heard this statement on the way to Williamston and knew at that time that Gibbs had obtained statement in writing.

A. Yes, sir.

[fol. 41] Q. Will you tell us why you didn't have Lloyd Ray arraigned promptly upon arriving in Williamston?

A. I couldn't have him arraigned until Court convened.

Q. Are you familiar with Section 15-46 of the General Statute of North Carolina, as follows: "Every person arrested without warrant shall be either immediately taken before some magistrate having jurisdiction to issue a warrant in the case, or else committed to the county prison, and, as soon as may be, taken before such magistrate, who, on



proper proof, shall issue a warrant and thereon proceed to act as may be required by law''?

A. Yes, sir, I have read that.

Q. Did you take Lloyd Ray before a magistrate on Sunday morning when you arrested him?

A. No.

(p. 209) Q. Tell us why you didn't?

A. That is not the usual custom when you arrest a man charged with murder.

Q. Is it the usual custom to obtain them illegally?

Objection by respondent overruled.

I ask you if it is the usual custom in your county when you arrest someone for a felony not to bring them before a magistrate?

A. No, I don't say that. We usually get a warrant for them as quickly as we can.

Q. Why didn't you do it in this case?

A. He was arrested around one-thirty and we were still continuing investigation and looking for the other party.

Q. You mean you didn't have the time to take him before a magistrate?

A. I wouldn't say I didn't have time but I felt like it was up to me and very important to arrest the other party as soon as we could.

Q. When did you arrest Bennie?

A. Bennie was arrested on Tuesday morning around five o'clock.

Q. And when did you have him in Williamston?

A. Immediately after he was arrested.

Q. Did you take him before a magistrate at that time?

A. No, sir.

Q. This was the time you already had Bennie in custody?

A. Yes, sir.

(p. 210) Q. Why didn't you take him before a magistrate?

A. There was a warrant sworn out for both of them but I couldn't tell you until I see the warrant.

Q. You don't recall when he was taken before the magistrate?

A. No, sir, not unless I could see the warrant.

Q. You have testified that you didn't have the warrant at the time you arrested Bennie?

A. Yes, sir.

Q. And will you tell the Court when you did obtain the warrant?

A. No, sir. I was notified about this on Sunday around twelve o'clock. Bennie was arrested on Tuesday and I hadn't been to bed and hadn't slept a wink during that time. I had been continuously going.

Q. Do you recall whether you obtained warrant after the statements were obtained from Bennie and Lloyd in Williamston?

A. Not unless I could see the warrant.

Mr. Moody: The papers we have show it was issued on the 8th of February and returned on the 9th.

The Court: I had thought it was agreed that both arrests occurred before the warrant was issued.

Q. Now, Sheriff Tyson, the warrant was not issued until [fol. 42] after both petitioners had been put under arrest?

A. That's correct.

(p. 211) Q. You testified, Sheriff, after these statements were obtained in Williamston the boys were taken to Raleigh?

A. That's correct.

Q. How far is Raleigh from Williamston?

A. Oh, to be guesswork I would say a hundred and fifteen or twenty miles.

The Court: About thirty from Williamston to Tarboro and seventy from here.

Q. Will you tell us why you took them to Raleigh?

A. I thought it was for their own protection than it would be to take them back to Greenville.

Q. You thought they couldn't stay at Williamston either?

A. That is the usual custom, when we have a prisoner charged with murder they are taken to Raleigh.

Q. Is it the usual custom to take a prisoner more than a (p. 212) hundred miles away from his family and friends?

A. They were not taken to Raleigh just to be away from friends and relatives but taken to Raleigh for their own protection. They could protect them and take care of them better than we can in our local county jail.

Q. You thought they would be in danger?

A. Possibility. The Sheriff of Martin County asked me Tuesday night if I would move them from there, that he was uneasy.

Q. He had heard threats?

A. I don't know..

Q. But he was concerned about their safety though they were thirty miles from Greenville?

A. Yes, sir.

Q. And they were taken to Raleigh?

A. Yes, sir.

Q. At the time you stopped at the home of Benny did you tell his parents where you were taking Bennie?

A. No, just stopped and told them we had him.

Q. Did you ever tell them thereafter where you were taking Benny?

A. They never asked me.

Q. Would you answer the question?

A. No, sir.

Q. You know whether anybody else ever told them?

A. I don't know.

(p. 213) Q. Did you ever tell Lloyd's parents where he was?

A. No. I might add that Bennie's father rode around with me practically all one night trying to help me locate him. He was very cooperative.

(p. 215) Q. Were you subpoenaed to bring those confessions with you?

A. Yes, sir.

Q. Do you have them?

A. Yes, sir.

Q. May I see them?

(p. 216) A. Yes, sir. (The witness hands papers to counsel).

Q. This document entitled "State Exhibit 32", would you identify that?

A. This is the statement taken by Gibbs in the car I [fol. 43] guess.

• The Court: That is not signed?

A. Just his mark.

Q. It purports to be notes on statement made by Lloyd Ray Daniels?

A. Yes, sir, that's right.

Q. That doesn't bear any signature?

A. No, sir.

Q. Tell me what this instrument is?

A. That is Exhibit 8 and that is Lloyd Ray Daniels and is marked witnessed by Ruel W. Tyson.

Q. Was this introduced in evidence at the last trial?

A. Yes, sir.

Q. I ask that the record indicate that the body of the alleged confession, State Exhibit 8, typed single space on one page and on a separate page is the statement, "The foregoing statement was made and signed by me this 8 day of February, 1949 in the Sheriff's office in Martin County before the following officers whom I know to be the officers whom I know to be the officers of law", and there is a mark which purports to be his mark, Lloyd's mark?

A. Yes, sir, except the names of the witnesses.

(p. 217) Q. Is it your custom where you obtain a statement to have it signed only on one page if it consists of more than one page?

A. I have handled it both ways. I have had them sign one page and sometime each page.

Q. In this case you had him sign the last page which contained no part of the confession?

A. That's true.

Q. I show you another and ask you to identify that?

A. State Exhibit 9, signed by Bennie Daniels, witnessed by Ruel W. Tyson, Lester D. Page, L. E. Manning and S. G. Gibbs.

Q. This statement has the entire body of the alleged confession on one page with a blank portion of approximately two or three inches?

A. Nearly three.



Q. And on the second page appears the following statement: "The foregoing statement was made and signed by me this 8 day of February, 1949, in the Sheriff's office in Martin County before the following officers whom I know to be the officers of law". Signed "Bennie Daniels", and witnessed. That is all that appears on the second page?

A. Yes, sir.

Q. There is no signature on the first page?

A. That is correct.

Q. Sheriff, Tyson, I wonder if we could go back over one point. At the time you took Bennie into custody and after you detained (p. 218) him did you at any time advise him of his right to see friends, counsel or family?

A. There was not anything said about counsel or family either.

Q. I take it that your answer is that you didn't advise him of his right to see friends, counsel or family?

A. No, there was nothing said about it.

(p. 219) Q. These statement- obtained in Williamston, were those verbatim transcripts of what Lloyd and Bennie said?

A. Yes, they are the statements they made in Williamston.

Q. These are statements of the boys and no one else?

A. Of the boys. They were made in Williamston.

Q. Anyone dictate these except the boys?

A. The boys did the talking and Mr. Arnold took it down. [fol. 44] Q. Did you examine this after it was taken down? Did you read it to see that it was the statement made by the boys?

A. I was sitting there and heard the statements the boys made and heard that when it was read.

Q. You heard this read back?

A. Yes, sir.

Q. The statements which you heard read back were the same as the statements made by the boys?

A. I would say it was the same statement they made. Arnold took it down in shorthand. I don't read shorthand.

Q. You read it after it was typed?

(p. 220) A. I heard it read.

Q. Then those are statements of the boys in their language?

A. Yes, sir.

Q. And you have read it and heard it and these constitute statements of the boys?

A. Yes, sir.

Q. You heard Bennie Daniels say, "I, Bennie Daniel, of my own free will and accord, without promise of reward or threat of bodily harm, and after being told that this statement could be used in court against me, make the following statement", and you also heard Bennie say, "The foregoing statement was made and signed by me this 8 day of February 1949 in the Sheriff's office in Martin County before the following officers, whom I know to be officers of law"?

A. That first paragraph I don't know whether that was his exact words or not but the main body of the statement is his.

Q. That's not what I asked you. You want to change your testimony?

A. No, sir. I want to explain. The first paragraph might not be his own words but the main body of the statement, they were his words.

Q. How about the last paragraph?

A. There may be some words in the last paragraph that was written by the stenographer.

Q. Parts of this statement were not dictated by Bennie?

(p. 221) A. The main body was. There may be some words that the stenographer might have added in the first and last paragraphs but they were all read to him.

Q. "I, Laura Ray Daniels, of my own free will and accord, without promise of reward and threat of bodily harm and after being told that this statement could be used in court against me, make the following statement", and the last paragraph, "The foregoing statement was made and signed by me this 8 day of February, 1949 in the Sheriff's office in Martin County before the following officers whom I know to be officers of law"?

A. That too may not have been dictated by Lloyd Ray. There may be a few words in the first and last not dictated by him.

Q. The only pages signed by Bennie and Lloyd are the second pages which you say may have been dictated in part by Arnold?

A. That was the last page that was signed. There might be some words in the last paragraph.

Q. You don't have any doubt about it?

A. There is a possibility.

Q. Do you think Bennie Daniels said, "The foregoing statement was made and signed by me this 8 day of February, 1949 in the Sheriff's office in Martin County before the following officers whom I know to be officers of law"?

A. I said there might be some words in the first paragraph that Mr. Arnold put in there.

(p. 222) Q. Which words would you say Bennie put in?

A. I don't know.

Q. Tell me which words you think Mr. Arnold put in?

A. I don't know, I didn't read Arnold's shorthand.

Q. You read what he typed?

A. I read this.

Q. You knew this was not all —?

[fol. 45] A. Yes, sir.

Q. And yet you let him sign that?

A. That was signed as of the whole statement.

#### Recross-examination.

Q. You say when you reach the end of a page you generally go on to the next page?

A. Yes, sir.

Q. Do you go to the next page before you finish a page?

A. Sometime I do, but I don't go from one page to the other. I didn't do that. Mr. Arnold can explain that better than I can.

Q. I show you the paragraph which was signed by Bennie Daniels (p. 229) and ask you if that wouldn't fit in on that same page?

A. It would not and have left room for the signatures.

Q. Signatures could have been signed on the side?

A. Not enough margin I don't think. I wouldn't say you could have very easily have gotten the rest of the statement and signatures.

Q. You could have gotten it all on that page?

A. You could have written all across the typewriting. It could all have been put on one page. It could have been written right on top of the typeing.

(p. 242) L. D. PAGE, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Bundy:

Q. You are Mr. L. D. Page?

A. Yes, sir.

Q. At this time we are talking about you were policeman in Greenville?

A. Yes, sir.

Q. Did you go to Williamston with Sheriff Tyson and Sheriff Manning on the night we are talking about?

A. Yes, sir.

Q. Did you go upstairs in the jail?

A. I did not.

(p. 244) Q. Did you slap or hit Bennie up there?

A. No, sir.

Q. Did you slap or hit either one of them at any time?

A. I did not.

Objection by petitioners to leading questions.

Q. State whether you were there when they made the statements in the Sheriff's office?

A. I was.

Q. State whether you or any other person either threatened them, offered any violence or intimidation to make a statement or any hope of reward that it would be better for them to make a statement or anything of the kind?

A. We never offered them any reward or threatened them in any way, shape, form or fashion. The statements were free and volunteer, as much so as you and I talking in this room.

Q. State whether they were reluctant or hesitant to make [fol. 46] the statements.

A. They were not. They were very open and free with their statements.



Q. State whether they were told by anybody whether they would have to make any statement?

A. They were told they didn't have to make a statement.

Q. By whom?

A. By the Sheriff.

Q. What else did he tell them?

(p. 245) A. That they didn't have to sign the statement after it was made. To explain that statement, there has been a great-to-do about the beginning of the statement. I dictated that statement which warned them of their rights there in the beginning of the statement that it would be used against them in court, first paragraph.

Q. Do you know whether or not you dictated the last paragraph?

A. I dictated the last paragraph. The reason for the second page, there was not enough room on the first page to close it and have the signatures. If you will bring me the statement I will explain that clearly. This is Bennie Daniels' statement, "I, Bennie Daniels, of my own free will and without promise of reward or threat of bodily harm, and after being told this instrument can be used in court against me, make the following statement". By that, it was put in there so he wouldn't make it if he didn't want to, and then he made the following statement. From there on he dictated it until the last paragraph which wouldn't give room for the signatures on this page: "The foregoing statement was made and signed by me this 8th day of February, 1949, in the Sheriff's office in Martin County, before the following officers, whom I know to be officers of law." I was giving him another chance to know he was dealing with officers and it was going to be used against him in court.

(p. 246) Cross-examination of E. D. Page.

By Mr. Taylor:

Q. Mr. Page, did you hear either one of these boys say they were entitled to have a lawyer before they signed any such (p. 247) statement?

A. No.

Q. Hear anybody advise them of their rights to see their family and friends before making such statement?

A. No, sir.

Q. At the time you say those statements were made how many officers were present?

A. I don't recall but several.

Q. Any colored people there?

A. Not that I recall.

Q. Any lawyer there for the boys?

A. No, sir.

Cross-examination of S. G. Gibbs.

(p. 276) Q. As soon as you got in the car you cranked up and started off?

A. Right.

Q. Then you began questioning Lloyd Ray?

A. Yes. Asked him what he knew about Saturday night, what he knew about the taxi driver getting killed. Told him we had his clothes and how did he get the blood on them.

Q. Did you advise him of his rights?

A. Sheriff Tyson told him he didn't have to make a statement.

Q. Did you?

A. No. Best I remember I didn't.

Q. Who is the one he gave the statement to?

[fol. 47] A. I was in the back seat with a notebook and flashlight and I made the notes.

Q. I would like to see that statement. (Counsel is handed the statement). This is the statement to which you are referring?

A. That is correct.

Q. You wrote this statement down yourself?

A. That's right.

Q. Did you park the car while writing this statement?

A. I did not.

Q. You wrote this statement while the car was in motion?

A. That's right.

Q. Was there a light in the car?

A. I had a flashlight under my left arm.

(p. 277) The Court: You had done that before?

A. Yes, sir, investigating accidents and on other occasions.

Q. And while riding in the car you wrote this statement while holding a flashlight under your arm?

A. Yes.

Q. At any time prior to the breaking down of the car did the car stop?

A. No.

Q. When you were in Williamston the following Tuesday you knew you had this confession?

A. That's correct.

Q. Why did you deem it advisable to get another?

A. We wanted to talk to the boys together and get a more detailed statement and get the two statements with the two boys together.

Q. He had already confessed in this statement. Could this statement have been an official record?

A. Yes.

Q. Yet you thought you should get another statement?

A. We wanted to get more detail statement.

(p. 281) Q. You concluded from what you heard that you better take these petitioners to Williamston for safety?

A. I am pretty sure if we had carried them to Greenville they wouldn't have last very long.

(p. 282) Q. You think the community might have taken them in its own hand?

A. As much as we hate to admit it feeling was running pretty high. We took them to Williamston for their own safety.

The Court: Was it on account of race?

A. No, sir. If it had been white men it would have been the same thing on account of the brutality of the crime. Of course at that time I don't think the general public knew whether it was white or colored who committed the crime.

Q. Did O'Neal live in Greenville?

A. Yes, sir.

Q. How long had he lived there?

A. I don't know. I understand he was raised out in the county.

Q. Married?

A. Yes, sir.

Q. Children?

A. His wife was expecting a child at that time. The child was born a month or two after that was my information.

[fol. 48] Cross-examination of Oscar Arnold.

By Mr. Taylor:

(p. 315) Q. What did you do when you first got to Williamston?

A. I waited with them until Mr. Roebuck—

Q. With who?

A. Chief Page and Mr. Manning and Sheriff Tyson. Mr. Gibbs was there. I don't know whether he went with us, and another patrolman.

Q. Who went upstairs to get the boys?

A. Mr. Peel and Mr. Manning.

Q. Who was brought first?

(p. 316) A. Lloyd Ray.

Q. You know why they were brought down one at the time?

A. No special reason.

Q. They were not brought down and questioned one at the time?

A. Not that I know of.

Q. You don't know what happened in the jail when they went to get them?

A. No, I didn't go up in the jail.

Q. Tell what happened while you were taking them down, who was saying what?

A. No one saying anything that I know of except the boys talking to me.

Q. You took it down in shorthand?

A. That's correct.

Q. How long did it take you to do that?

A. I can't say the exact time we was there. There possibly an hour and a half or two hours.

Q. How long it take you to take it down in shorthand?



Q. A. I don't know how long it took them to tell me that. Fifteen minutes or twenty.

Q. And how long it take you to transcribe it?

A. About the same or twenty-five.

Q. Were you in the same room with them while you were transcribing it?

A. I was in the room with Lloyd Ray.

(p. 317) Q. Where was Bennie?

A. In the other room.

Q. You had them in separate rooms?

A. Just one door between them.

Q. What was the purpose in that?

A. They was talking to Bennie and Chief Page and I were in the room with Lloyd Ray while they were in the other room talking to Bennie.

Q. Talking to Lloyd Ray?

A. N-, typing it out.

Q. How many officers with Bennie?

A. I don't know. Three or four.

Q. How many officers in the room with Lloyd Ray?

A. Then he gave the confession?

Q. Yes.

A. Three or four.

Q. They were armed?

A. I reckon so, I never seen officers running around without being armed.

(p. 318) Q. Chief Page said, "I, Bennie Daniels"

A. Yes.

Q. Chief Page also said, "The foregoing statement is signed by me, etc"?

A. That's right.

Q. You didn't say that yourself?

A. I typed it on there.

[fol. 49] Q. Insofar as the last statement and the first statement, they are not the defendants' statements?

(p. 319) A. They didn't dictate that to me. They dictated the middle part.

Q. Yet all of that appears over their signatures?

A. Sure it does.

Re-redirect examination of Lloyd Ray Daniels:

(p. 325) Q. On your way back from Raleigh to Wilson you heard Captain Dorsey testify they stopped the car and you told them you had committed this crime. Did you tell that to Captain Dorsey at that time or any other time?

A. No, sir.

BENNIE DANIELS, recalled:

Re-redirect examination:

Q. Bennie, you heard Captain Dorsey testify that on two occasions after you had made the confession in Williamston, on one trip from Goldsboro and one trip from Raleigh, they stopped the car and you made confession that you had committed the murder?

A. No, sir, didn't make no kind of confession. Only kind I ever made between the laws was in Williamston. I made no other confession whatsoever except the time I was in Williamston.

Q. On the way from Williamston to Raleigh that night did you and Lloyd Ray have any talk about being sorry you committed the crime?

A. No, sir. That man yonder said we would get life imprisonment.

Q. Who said that?

A. That fellow with the blue suit.

Q. Mr. Manning?

A. Yes, sir, he said "I think you boys will get life imprisonment. You boys will be old when you come out." He didn't hear us say we was sorry.

Q. Who else was present?

A. Mr. Gibbs and I and Lloyd Ray.

Q. Mr. Manning and Mr. Gibbs were the only two officers?

A. Yes, sir, only two that carried us to Raleigh. I just can't remember what he said but he said, "I think you boys (p. 327) will get life imprisonment," but he said, "You boys will be old when you get out."

The Court: What made him say that?

A. I don't know.

The Court: Had you or Lloyd Ray made a statement to them?

A. Only the one at Williamston.

The Court: Were you carried to Raleigh later on in the same day the statement was signed?

A. Same night.

The Court: Mr. Gibbs and Mr. Manning take you?

A. Yes, sir.

The Court: On the way up there Mr. Manning said, "I think you boys will get life imprisonment"?

A. Yes, sir, he said, "You boys is young. You may get life imprisonment but you will be old when you get out."

The Court: What did you say to that?

A. I can't remember exactly what I said.

The Court: Did you say anything?

A. Probably said something.

The Court: Did Lloyd Ray say anything?

A. No, sir, I don't remember him saying anything.

[fol. 50] (p. 329) Testimony in re systematic exclusion of negroes from grand and petit juries phase of the case is resumed.

(p. 335) Mr. Rogge: I want to call Your Honor's attention to certain figures already in the record so that Your Honor may follow the testimony. There was a stipulation to the effect that the jury scroll book contained names of approximately ten thousand persons and that was described to Your Honor as the book in which for different years from 1941 to 1949 list of names were contained. I am directing myself to the year 1947. It is from that selection of names that the grand jury — making this indictment

The Court: Is the stipulation to the effect that for that particular year there were approximately ten thousand names in the book?

Mr. Rogge: In the jury scroll book. I now call your attention to page 141. The tabulation appears on Page 128 (p. 336) of the record of trial. Totals on tax list give through 1948 from the year 1946, according to H. L. Andrews;

15,517, which he broke down, 10,344 white tax payers and 5,173 negro tax payers. He also gave it for other years. I will read them off. It is about the same percentage  $33\frac{1}{3}$  per cent. For 1945, 14,368 of which 9,466 white, 4,902 negro; for 1944 14,573, of which 9,542 white, 5,031 negro; for 1943, 14,876, of which 9,760 white and 5,116 negroes; for 1942, a total of 15,328, of which 10,047 white, and 5,281 negro; in 1941, a total of 15,944 of which 10,846 white, and negro 5,468; for 1940, total of 16,137, of which 10,343 white, and 5,544 negro; for 1939, total 15,761, of which 10,305 white, 5,456 were negro; for 1948 16,926 of which 11,193 were white, and 5,733 negro; for 1947 total of 16,455, of which 10,894 white, and 5,561 negro.

MURRAY GORDON, being first duly sworn, testified as follows:

Direct examination.

By Mr. Rogge:

Q. Will you state your name?

A. Murray A. Gordon.

Q. Where do you live?

A. New York.

Q. Your business or profession?

A. I am an attorney.

(p. 337) Q. Can you give me your association?

A. Member of the firm of Rogge, Fabricant, Gordon and Goldman.

Q. How long has that association been existing?

A. Since September, 1947.

Q. Mr. Gordon, have you made an examination of the documents on this table which have been listed as "P-1" through "P-5"?

A. Yes, sir.

Q. Will you tell us what examination you made?

General objection by respondent to all the testimony about to be given by the witness. The objection is overruled.



A. I first went through the registration books for each precinct, each of the twenty precincts.

Q. Referring to these twenty volumes

A. Yes, and in going through I took down the names of all those persons designated as "negroes" and who are registered in the year 1946 or previously. I then compared those names with the jury scroll book for the comparable township or precinct.

Q. This volume which has been referred to as one of the books "P-1" through "P-5"?

A. Yes. In this fashion I was able to ascertain which of [fol. 51] the persons who were negroes were on the jury scroll book and which (p. 338) were not, that is those negroes whose names were in the registration books and whose names appeared in the jury scroll book.

Q. This would be the registration through the year 1946?

A. Yes, sir. I then went to the tax list and compared each name in the negro portion of each township with the names which appeared in the comparable township in the jury scroll book. In this way I was able to ascertain which persons appeared in the negro section of the tax list and also appeared on the jury scroll.

Q. Did you put those tabulations and summaries on sheets of paper?

A. I did.

Q. You have one for each voting precinct?

A. That is correct.

Q. Will you hand them to me?

The sheets of paper on which the tabulations referred to appear are marked "P-6A" through "P-6U" inclusive.

Q. I now hand you documents marked P-6A through P-6U for identification. I ask you if those are the tabulations and summaries which you prepared as a result of the process which you have just finished describing for us?

A. Yes.

(p. 339) Petitioners offer in evidence the sheets of paper containing the tabulations and summaries identified by the witness Murray A. Gordon, as follows:

P-6A Ayden Township

P-6B Beaverdam Township

P-6C Belvoir Township  
 P-6D Bethel Township  
 P-6E Carolina Township  
 P-6F Chicod Township (No. 1)  
 P-6G Chicod Township (No. 2)  
 P-6H Chicod Township (No. 3)  
 P-6I Chicod Township (No. 4)  
 P-6J Faulkland Township  
 P-6K Farmville Township  
 P-6L Fountain Township  
 P-6M Greenville Township (General)  
 P-6N Greenville Township (No. 1)  
 P-6O Greenville Township (No. 2)  
 P-6P Greenville Township (No. 3)  
 P-6Q Greenville Township (No. 4)  
 P-6R Grifton Township  
 P-6S Pactolus Township  
 P-6T Swift Creek Township  
 P-6U Winterville Township

Q. How many names of negroes in the twenty voting registration books for Pitt County did you also find in the jury scroll?

A. 140.

Q. Leaving aside those names where there were identical names for white and negro persons in the tax list or in the voting registration books for the same precinct or township, how many names did you find added to the jury scroll book for the negro sections of the tax list for 1946?

A. Three.

Q. You mean to tell us out of more than five thousand names you found only three added?

A. Yes, sir.

[fol. 52] (p. 340) Q. Can you tell us by looking at the exhibit the names of these three people?

A. Yes, sir. Belvoir Township Mr. George Winberly, Grifton Precinct, Mr. M. C. Dixon and Mr. Isaac Duggins.

Q. These two that you found in the Grifton Precinct did you find those in alphabetical order?

A. No, sir.

Q. Where?

A. They came at the end of the list of Grifton Precinct and out of alphabetical order.

Q. Did you find any precinct indication in the jury scroll book?

A. Nothing to indicate the township from which they came.

Q. Can you indicate in the book where you found two of these three names?

A. Yes. (The witness indicates.)

Q. Did you find any other names out of alphabetical order in the jury scroll book?

A. In that Grifton precinct one other name out of order. I think his name was Smith. And at the end of Ayden township there were a list of names which didn't belong to the Ayden township. They were from various other townships.

Q. Aside from these two exceptions was the jury scroll book in alphabetical order?

A. Yes, sir. At least by the first letter of the name.

(p. 341) Q: Did you hear Mr. Joyner's testimony that he went first to the registration books?

A. Yes, sir.

Q. Did you find any indication in the alphabetical order that bore out his statement, compare names on the scroll book with the names on the voting list?

A. Yes, very often you find same sequence of names appear in the jury scroll book as appeared in the registration books. This was not always true but frequently true.

Q. I notice on these pages the letter "R", the letter "T" with a number after it, and sometime the designation "RW" or "WR". Tell us what you mean by those symbols?

A. When we went through the registration books we took all the names of negroes registered for 1906, or earlier, checked it against the jury scroll book, wrote all those names down, put those names either down in a list called "jury scroll" or that portion called "Not on jury scroll", and if a person's name appeared on the registration books we put the letter "R" next to it.

Q. The letter "R" means this name came from the voting registration books?

A. Means it appears in the voting registration list.

Q. What does the letter "T" indicate?

A. When we found the name in the tax list, that is the negro section of the tax list, which was also on jury scroll we would (p. 342) put that name down and put the letter "T" and the number that indicated the ticket number in the tax list of the individual. We didn't put down names of all negroes whose names appeared in the tax list and didn't appear on jury scroll because that would be in excess of five thousand.

Q. What does "WR" mean?

A. On occasions we found that the same name which appeared in the jury scroll book could be attributed to a white person and a negro. Where we found the name was also negro we put the name down but indicated that name also appeared as belonging to a white person in the register of the voting registration books.

Q. How many instances where you found identical names for white and negro persons in the same voting precinct or township?

A. We never indicated there was an identity of names unless it was the same name in the same township and in the [fol. 53] same precinct unless we found the identity to be that close.

Q. How many instances of that did you find?

A. I have to check my notes on that. Forty-two.

Q. Leaving aside the identity of names in these forty-two instances, how many names of negro persons did you find in the jury scroll book for 1947?

A. One hundred and forty three names.

Q. And with the identical names?

A. One hundred and eighty five.

(p. 343) Q. Since you are also my partner and I rely on you very greatly have I covered the entire examination or are there additional facts in this summary you want to call to the Court's attention?

A. I would call the attention of the Court to the fact that the total number of negroes registered in 1946 throughout Pitt County was two hundred and fifty-nine.

The Court: As appear on the voting book?

A. Yes, sir.

Q. That is through the year 1946?

A. Yes, sir. This is a permanent registration.



The Court: You referred once or twice to "We found this". Who were your helpers?

A. I was assisted by Mr. Johnson, who is here today, an attorney whom I met through Mr. Gates, and by Mr. Williams and Mr. Borekman. At all times there was a member of the staff representing the respondent present.

Q. Was there a checking by the respondent of the summaries?

A. No, sir.

Q. You arrived at that yourself with the aid of the persons you mentioned other than Mr. Brogden or someone for the respondent?

A. Yes, sir.

Cross-examination of Murray A. Gordon:

(p. 348) Q. When you found a name, we will say James Jones, and found another name, James E. Jones, what did you do to that?

A. You mean James Jones in negro tax list and James E. Jones in the scroll book? I think we wouldn't list that as a negro name. Wherever there was such question, either spelling or missing initial, we would check back with the registration book or white section of tax list and invariably you find the name accounted for in those two sources exactly as appeared on the scroll. I found in instances where you could find exact duplicate of the name either in the tax list or registration list.

Q. Didn't you find some names that were not on the registration (p. 349) books, tax scroll and scroll books?

A. You mean white names?

Q. Anybody.

A. I can only answer in this way. That we accounted for every name of a negro on the registration book. It appears either on the jury scroll or we listed it as not being on jury scroll. So every name of negro appearing on the registration book is here.

Q. Didn't you find some names not on the registration book, white and negro, that were on the tax scroll?

A. You mean jury scroll?

Q. Jury scroll?

A. That didn't appear either in registration or tax books?

Objection by Petitioners.

Mr. Rogge: The testimony of Mr. Joyner is that he went first to the voting registration book and from there to the tax list, and handed it to the commissioners and—

A. I found no names of negro on jury scroll book that [fol. 54] was not on tax list or registration.

Q. Didn't you find both?

A. I didn't check the white names on jury list to see whether they appeared on the tax list or registration.

The Court: The testimony is that the jury scroll is made up entirely from registration books and tax lists.

(p. 399) W. J. SMITH, is recalled for further examination.

Recross-examination.

By Mr. Rogge:

Q. You were previously sworn and testified?

A. Yes, sir.

Q. And I believe it was your recollection that although certain names were selected none were added on the list that came to you?

A. That is correct.

Q. Do you recall when it was that you got this list from Mr. Joyner?

A. First Monday in June is my recollection on it.

Q. And at that point of time you had which township?

A. Bethel, Belvoir, Carolina and Pactolas.

Q. Now do you recall just what it was that Mr. Joyner gave you in June?

A. Mr. Joyner gave us a list of names at the board meeting in June. These names were by townships.

Q. And you got four lists of names, Bethel, Belvoir, Carolina and Pactolas?

A. Yes, sir.

Q. If you will look at the tax list you will find for Bethel Township there are on that tax list 352 people who are negroes but that on the jury scroll there are only two, J. B. Chance and Salomi Armistead McNair. I want to know what process you went through to eliminate three hundred and fifty names of negro (p. 400) persons from that list?

A. I don't know the process of any elimination. The list was submitted to us by Mr. Joyner. In my looking it over very few deletions made. Only those dead, of my certain knowledge were dead.

Q. If you will take the tax list for Bethel Township and look at the list of negro taxpayers and then look at the jury scroll book you will see they have all been eliminated except two names. That elimination must have taken place somewhere. I want to find out where it took place?

A. That I don't know. The list that came to me was a consolidated list of all the various sources from which he got the names.

Q. Made out four lists?

A. Yes, sir, consolidated for each township. I didn't get a list of the registration books or tax group. I got a list that was consolidated on each side of the paper like this.

Q. You know that the tax book is divided?

A. Yes, I am familiar with that.

Q. You can run down the second list of alphabetical names in this book for Bethel which that sheet indicates totals three hundred and fifty two and the only two names you will find on that jury scroll are Messrs. Chance and McNair. Do you recall any of them?

A. I recall them.

(p. 401) Q. You know Mr. Chance?

A. Yes.

Q. Know McNair?

A. Yes.

Q. Would you say that both of them passed the necessary qualification and intelligence for jury duty?

[fol. 55] A. Very definitely.

Q. They are on there?

A. Yes, sir.

Q. Tell what the basis was for excluding the remaining three hundred and fifty which are in the negro portion of the tax list for Bethel Township?

A. I don't know that they were excluded.

Q. You may come down and compare the jury scroll list for 1947 with the tax list and I think you will find that to be a fact. This is a township in your district?

A. Yes, my own township. I know there are more than two on there, on the negro tax list.

Q. There are three hundred and fifty two. But you won't find more than two of those names in the jury scroll book which means three hundred and fifty out of the three hundred and fifty two were left out. I would like to have that process explained.

A. That's something I don't know about.

Q. Can you name any other negroes who are on the 1946 tax list for Bethel Township other than the two listed on that page which (p. 402) are in the 1946 jury scroll?

A. I am not familiar with the jury scroll. I have never seen it. The thing we passed on was on a list like this and was clipped up.

Q. And you passed on it before it was clipped up?

A. Yes, sir.

Q. Any other negro other than the two listed on page 6-D which you recommended to the commissioners?

A. I think so but I don't recall them.

Q. You want to look at the jury scroll and refresh your recollection as to any other names you recommended go in the jury scroll book?

A. I don't know. I didn't know it existed until I came in this court. The list came to us in this form. I wasn't present when the list was clipped.

Q. You were the commissioner who represented Bethel Township?

A. Correct. /

Q. Can you name any other negro than the two on that list that you recommended for jury duty from that township?

A. I can't. I don't remember.

Q. You want to take the list of names that finally went in the jury scroll book, all the names decided on by the com-



missioners went in here, you think that would refresh your recollection as to any recommendation you made?

A. The only thing I would refresh my recollection on would be (p. 403) people who lived in that particular area. Whether they were on that list I don't know. I don't recall.

Court adjourned Wednesday, Dec. 20, 1950 at 5:00 P.M. and reconvened Thursday, Dec. 21, 1950 at 10:00 o'clock A.M.

Both petitioners are present in court.

Examination by Mr. Rogge (continued):

Q. Mr. Smith, you know one of these townships better than another?

A. Yes, sir.

Q. Which one?

A. Bethel.

Q. Is that your home?

A. Yes, sir.

Q. How long have you lived there?

A. Forty-eight years.

Q. You knew more qualified negroes than Messrs. Chance and McNair?

A. Yes, sir, more than that.

Q. How many did you know of the negro population?

A. I suppose I knew eighty-five per cent.

[Vol. 56] Q. Of the negro population too?

A. Yes, sir.

Q. You would tell us you knew about one-third of the names in Carolina, Pactolas and Belvoir?

A. Yes, sir.

(p. 410) Q. On this list forty one you don't know, according to our calculation. Did you make any effort to try to find out what their qualifications were for jury service?

(p. 411) A. I made effort to find out about everybody on the list whom I didn't know.

Q. From whom did you make an effort?

A. Various people.

Q. You didn't name them the other day?

A. Not in Bethel I didn't.

Q. You told us about consulting Paul Davenport in Pactolas and the Hollands for Belvoir. I would like to.

A. I would like to make a statement about my physical condition. Between the first meeting in June, when we received this list, and before we turned it back in I suddenly began to lose my vision in my right eye and found that surgery was necessary and they placed ten point glasses on my eyes in June with instructions not to read. I had to wear these glasses about a year. I had to have help in order to get this thing done and I recall very distinctly getting the people in my own business who knew the people as good as I did, or better, to help me.

Q. With whom did you sit down and talk about the forty one you didn't know?

A. I didn't select the forty one out. I just went over the list and tried to determine the ones I thought were qualified.

The Court: You went over the list and most of them it appears you knew. From time to time you came across the name of an individual you didn't know. Did you automatically (p. 412) eliminate that individual or did you make some investigation and if so with whom did you talk about those?

A. I talked with four different people in my own office. When we came to a name none of them knew I felt something wrong about it.

Q. You nor the four you consulted in the office didn't know a name you didn't use it?

A. Yes, I would qualify that by saying there may have been a few about whom I discussed the matter with the policemen and probably the Mayor's office of Bethel.

Q. You still ended up with some of those you had no information?

A. Correct.

Q. You mean to tell us out of three hundred and fifty-two, or thereabouts, having eliminated a few on estates, you ended up with only two in your township with the necessary qualifications?

A. So far as that tax list is concerned. There are two or three others on the jury scroll list.

(p. 413) Q. From Bethel Township?

A. Yes, but not on the tax list. Carrie Allen. Also Mrs. Boston Chance.

Q. Wife of J. B. Chance?

A. Yes, sir.

Q. Is she on this jury scroll?

A. I think so.

Q. Will you find it for me?

A. There is Mrs. Carrie Allen and Mrs. J. B. Chance and J. B. Chance.

[fol. 57] Q. Out of the three hundred and fifty those are the only ones you would mention in Bethel Township?

A. Yes, sir.

The Court: Have you been over the list of all the jurors whose names are on the jury scroll in Bethel Township?

A. Yes, sir. Yesterday afternoon after court.

Q. And you found how many?

A. Five.

Q. Two that have been mentioned before?

A. Mrs. Chance and Carrie Allen and one more.

Q. Was some other person with you when you went over it?

A. No, a group.

Q. You think there were five?

A. Yes, sir.

(p. 414) Q. Could there be more than one Mrs. Carrie Allen?

A. Yes, sir.

Q. Is there also a white woman by the name of Carrie Allen?

A. Yes, sir.

Q. I call your attention to the fact that on the registration for Bethel Township there is a Mrs. Carrie Allen checked as white?

A. Yes, sir.

Q. Is the Carrie Allen on the jury scroll a white woman or negro.

A. I don't know. It could be either.

Q. Now the list you had before you as one of the members of the board of county commissioners came either from the registration list or from the tax list?

A. I think consolidated list of both.

Q. Can you tell me if you can find a Mrs. Carrie Allen, a negro, in either one?

A. According to this record that is white. There is not one on here.

Q. Can you now tell us on the basis of that that the Mrs. Carrie Allen in the jury scroll is the white Mrs. Carrie Allen?

A. I cannot because the only white Mrs. Carrie Allen I know I think lives in Martin County, just across the line, but I am not certain of that.

Q. The address is here isn't it?

A. I guess so. It would be on the registration book.

(p. 415) Q. Don't we have an address for her in Bethel? She is registered over there?

A. Yes, sir, Robersonville, N. C. However, she could live in Pitt County and get her mail in Robersonville.

Q. I have you that Mrs. Carrie Allen on the scroll-book is the same Mrs. Carrie Allen listed from Bethel. You told us you added no names to the list?

A. I did not. I deleted some. So far as I know I added none.

Q. Explain to me how it could be in there then the Mrs. Carrie Allen who is registered as white in the Bethel registration book?

A. I don't know. I would be glad to accept that.

The Court: Considering the record I think it must be the white woman.

Q. Now let's go to Carolina Township. That is one of your four townships?

A. Yes, sir.

Q. You can look at the tax list and find on there names of two hundred and thirty six negroes and not a single one on the jury scroll. Tell us how that happened?

A. They were eliminated for the same reason.

Q. Who did you consult about that?

A. Several people in Carolina Township. Mr. J. H. Bernhill, Jr., for one.



Q. You didn't mention him the other day?

A. You didn't ask me. You didn't get to Belvoir.

(p. 416) Q. How many on that list of two hundred and [fol. 58] thirty six for Carolina Township do you know?

A. I don't know how many I know of them.

Q. Can you run down the list and tell us whether you know any in Carolina Township?

A. Yes, sir.

Q. Will you run down the list and tell us how many you know in Carolina Township? (The witness does as requested.)

A. I know eighty.

Q. And how many of the others that you don't know did you check on to find out?

A. I did the same thing. Used the list. One of our commissioners helped us some. He was born and reared in Carolina Township, Mr. Perkins. I had two men I recall who helped me specifically with Carolina Township.

Q. How many of the remaining one hundred and fifty that you don't know did you get the requisite information?

A. I think the majority of the list was gone over.

Q. But there remain a substantial number you didn't have sufficient information that you left them off?

A. Somebody told me in each instance about the ones I didn't know.

Q. You say in your home township there were some you didn't have specific information on and you left them off. Didn't you do the same thing with Carolina?

A. Might have been some. I knew the Bethel.

(p. 417) Q. Pactolas Township, out of one hundred and twenty-six none on the jury scroll. How many of those do you know?

A. Very few. Probably ten or fifteen.

Q. The rest you don't know?

A. That is correct.

Q. You checked on Pactolas with Paul Davenport?

A. Either Mr. Paul Davenport or his son or Mr. Noel Lee. He came and worked with me several hours.

Q. Paul Davenport is white?

A. Yes, sir.

Q. How about Neal Lee?

A. Yes, sir, white.

Q. Did you check with any negroes to find out about those you didn't know?

A. No, sir, I didn't.

Q. In Pactolas did you end up with some on which you didn't have any information as in Bethel?

A. That's true.

Q. The remaining Township is Belvoir, one hundred and sixteen negroes on the tax list but only one got on the tax scroll, George Winbrell.

A. Same situation there.

Q. How many of the one hundred and sixteen did you know?

A. Probably half of them.

The Court: Did you indicate on the tax book whether they are non-residents of the county?

A. Yes, sir.

(p. 418) Q. Suppose you go through the list from Pactolas and tell us how many you know?

A. I wouldn't say over ten or twelve.

Q. Then go to Belvoir.

The Court: How many out of that number are non-resident or persons deceased? after the tax books were made up?

Mr. Rogge: Tell us which are estates or non-residents.

A. There seems to be four estates and non-residents.

Q. Now run through it and tell us how many of the one hundred and sixteen you know? (The witness does as requested.)

A. Sixty-two.

Q. Out of the one hundred and sixteen you know sixty two and the balance you don't?

A. That's right.

[fol. 59] Q. As to the balance in Belvoir, one hundred and twelve, it leaves about fifty you don't know. Did you leave off in Belvoir some that you didn't know?

A. It may have been such.

(p. 419) Q. Out of approximately eight hundred and thirty names in your four townships who are on the negro tax list, Mr. Smith, only three or four end up on the jury scroll. How do you explain that?

A. Simply by not being qualified under the law.

Q. Or you not having sufficient information?

A. I think I had sufficient information.

Q. You told us one time you didn't have sufficient information on all and now you say you did?

A. There were not but a few in each township none of us could trace.

Q. And those you left off?

A. Yes, sir.

Q. So that out of more than eight hundred you you end up with about four?

A. Whatever is there. I don't know the number.

(p. 424) J. VANCE PERKINS, having been first duly sworn, testified — follows:

Direct examination.

By Mr. Rogge:

Q. State your name and address?

A. J. Vance Perkins. I live in Greenville.

Q. Have you held any county office there?

A. Yes, sir, on the board of county commissioners from December 1, 1946 to December 1, 1950.

(p. 425) Q. What townships were in your district?

A. Greenville.

Q. That is divided into four election precincts?

A. Yes, sir.

Q. The total number of negroes on the tax list is fifteen hundred and thirty seven from Greenville. How many of those do you know

A. I couldn't say. I probably know a third of them.

(p. 426) Q. You think you know roughly one-third?

A. Yes, sir.

(p. 427) Q. Tell us what you did with the list of names?

A. I checked it over. Checked it for selection of juries for that particular time.

Q. Tell us what you did?

A. Went over the list. I remember going to Mr. Henry Andrews, tax collector.

Q. He is white?

A. Yes, sir.

Q. You didn't check this list with any negro?

A. No, I went over the list and then went to Mr. Andrews to see if he knew some I didn't know.

Q. You and Mr. Andrews between you didn't know all of them?

A. No, sir.

Q. How many did you end up with that you had the information half of them?

(p. 428) A. Probably so.

Q. Suppose you take the negro section of Greenville and go through there and go down the list and tell us those that you think are qualified?

A. I don't know whether I can do that or not. Here is Charlie Allen, Lawrence Anderson, Jr.—

[fol. 60] The Court: Are you calling the names of those persons you consider were qualified for jury service?

A. Yes, sir.

Lonnie Darinbill, Dr. J. A. Battle, W. H. Davenport, and W. H. Davenport's wife. I don't know her name.

Q. Were they both qualified?

A. Yes, sir. Dennis Dupree, Walter E. Flannagan, George Gorham, Jr., Dr. C. R. Graves, Samuel Hemby, Jr., Lawrence Hines, Nelson Hopkins.

Mr. Bundy: Doesn't he live in Faulkland Township?

A. Maybe so but they have it here Route 1.

Andrew Jenkins, John Henry Knox, Chester Mooring, Rev. J. H. Nimmo, W. K. Norcott, Wiley Norcott, Frank



Norris, Jr., Lawrence Payton, Charlie Spell, George Streeter, J. D. Taft, Sylvester Tyson, G. R. Whitfield, Sylvester Wilson, Shade Wilson.

Q. Mr. Perkins, you gave us a list of twenty seven names. Aside from W. H. Davenport and G. R. Whitfield, who are on the voting list for Greenville No. 1 Precinct, and Sylvester Wilson and Frank Norris on the voting list Greenville No. 3 Precinct, I (p. 429) want to know if you find a single one of those as qualified on the jury scroll for 1947?

A. I think that is all I see.

Q. Aside from the four who are also registered as voters you find not a single one of the twenty-seven names you gave is on the jury scroll?

A. Doctor Battle is a professional man and he wouldn't serve.

Q. Aside from Davenport, Norris, Whitfield and S. Wilson, who are registered as voters, aside from those four you find none of the remaining twenty-seven in the jury scroll book?

A. The book you give me, no, sir.

Q. Now, if those people are qualified how come they are not in the jury scroll book?

(p. 430) A. That I couldn't say.

Q. You told us Greenville was your district?

A. That's correct.

Q. Do you have any explanation?

A. No. A lot of them on that book not on the scroll book, white and colored too.

Q. I am talking about the twenty-seven.

A. I expect a lot qualified in the whites who are not in the books.

Q. That is not responsive to my question.

A. I don't know.

Q. Now I am going to show you a list of those you can find in the jury scroll book if you wish to which are on there which you didn't give to us and which are on the registration list. Do you know I. A. Artis?

A. I don't believe so.

Q. That name is on the jury scroll. You know how it got there?

(p. 431) A. I consulted two or three for names that I didn't know myself.

Q. You said no names were added?

A. I said if they were I didn't remember.

Q. What is your best recollection whether you added names?

A. I don't remember adding any.

Q. Run down this list on Greenville Township No. 1 on the left hand side of the page except the last name which is registered as white. Aside from Whitfield and Davenport how many others do you know?

A. I know Allen.

Q. What about Lillian Artis?

[fol. 61] A. No, sir.

Q. Travis Allen?

A. I do.

Q. David L. Daniel?

A. Don't know him.

Q. Charlotte Flannagan?

A. I don't know her.

Q. Mamie G. Garrett?

A. Might know her.

Q. Graves?

A. Doctor Graves.

Q. James W. Graves?

A. No doubt I know him.

Q. Elijah J. Little?

A. No.

(p. 432) Q. J. C. Larence?

A. No.

Q. J. W. Moye?

A. Don't know him.

Q. It is in the tax list?

A. I don't know.

Q. What about H. J. McLawhorn?

A. No.

Q. Sallie A. Phillips?

A. Don't know her.

Q. Addie Spence?

A. No.

Q. Lillie R. Taylor?

A. No.

Q. Nearly all those names you don't know and you find them in the jury scroll. Can you account for it?

A. No.

Q. It was your district?

A. Yes, sir. I am not saying any were added or not.

Q. How did they get on the scroll book?

A. I don't know unless somebody put them on there.

Q. Greenville Township voting precinct No. 2, names on the jury scroll, on the left hand side of the page aside from W. H. Davenport, whom you have identified will you tell us how many of those you know?

A. I think I know James and J. H. Wooten and I might know (p. 433) Will Shearin.

Q. Out of nine you might know two?

A. Yes, sir.

Q. How did they get on the list?

A. I don't know.

Q. This is your voting precinct?

A. Yes, sir, same answer for all four.

Q. Look at Township No. 3 and go down the first list and second list and tell us how many of that list you know?

A. I think I know Joseph Donaldson and Ernest Dupree and Thaddeus Forbes. I know Frank Norris and Henry Payton and there is Sylvester Wilson and I think I know L. W. Woofen.

Q. That is seven out of forty-five names. Do you know how the balance of the thirty eight names in Greenville Township No. 3 got on the jury scroll?

A. No, sir.

Q. Look in Greenville No. 4 on the left hand side and tell us how many of that list you know?

A. S. I. Salter. I know Herbert Whitehead, LeRoy Barnes, LeRoy Hoddard.

Q. You know four out of that list?

A. Something like that.

Q. And your answer is the same, you don't know how those names got on the jury scroll?

A. Yes, sir.

(p. 437) Re-direct examination.

By Mr. Rogge:

Q. Can you give us the name of a single person that was [fol. 62] added to the jury scroll list who doesn't appear in the voting registration?

(p. 439) A. No, sir, I can't.

(p. 439) Re-direct examination.

By Mr. Bundy; W. J. Smith:

Q. Can you recall any colored person from whom you sought assistance in making up the jury list?

A. The only incident two negroes who are on the advisory board of negro education, called them in and asked them to go over with me the question of the school teachers to find if any of them residents.

Q. School teachers generally come and teach during the school session?

A. Yes, sir.

(p. 440) Re-recross examination.

By Mr. Rogge:

Q. Is that the only inquiry you made with the negroes?

A. With the negroes.

That is all.

The Court: Mr. Smith is excused.



M. D. HODGES, having been duly sworn, testified as follows:

Direct examination.

By Mr. Rogge:

Q. State your name?

A. M. D. Hodges.

Q. Where do you live?

A. Grifton, Pitt County, North Carolina.

Q. Grifton is also a voting precinct?

A. Yes, sir.

Q. But it is divided into township, part in Ayden Township?

A. Yes, sir, and Swift Creek.

Q. In two counties?

A. Yes, sir, one in Pitt and one in Lenoir.

Q. Did you hold a county office in 1947?

A. Yes; sir.

Q. What?

A. Member of the Board of County Commissioners.

Q. From when to when were you a member?

A. From June 1940 to date.

Q. You are still a member of the board?

(p. 441) A. Yes, sir.

Q. Were you chairman of the board?

A. From the first Monday in December, 1948 up to date.

Q. Became chairman the first Monday in December, 1948 and held that office since?

A. Yes, sir.

(p. 443) Q. Go through the Ayden list and give us the names of negroes you think are qualified to vote, the names you thought in 1947 were qualified? That is when you did this job?

A. Yes, sir. M. C. Dixon. You want the ones I think qualified now or then?

Q. The ones in 1947. I want to know all those on whom you passed judgment in 1947, you thought at that time were qualified?

A. H. R. Reaves.

Q. What line is that on?

A. 48.

Q. You have given us two names?

A. That's right.

Q. Look at line 1414, there is the name of William Evans.  
[fol. 63] A. I see the name.

Q. You think he was qualified?

A. I don't know.

Q. Then suppose you tell us how a man you didn't know whether he was qualified or not got on the jury scroll?

A. That's very easy. I don't need the book to tell you. When I got this list I first went over the list and went to Ayden and got Mr. Dixon and Mr. Cannon——

Q. White or colored?

A. White.

(p. 44) Q. Did you confer with negroes?

A. No, for the reason I couldn't get any unless we paid them. I went to his home and stayed until about twelve o'clock and went over the list. I didn't know all the people in Ayden. They didn't know them all and people we didn't know naturally were rejected. I also——

Q. Those whom you didn't know you rejected?

A. Absolutely. That's common sense. I went there and interviewed those two men.

Q. If the people with whom you consulted and you didn't know the qualifications of a person they were excluded?

A. Sure.

The Court: That would apply to the negro race or both races?

A. Both races.

We went through the entire list. I suppose I spent six hours at Mr. Dixon's home.

Q. Out of a total of five hundred and eighty nine there were two you say were competent?

A. Yes, sir.

Q. Nellie——, you know her?

A. I don't know her.

Q. You know how she got on the jury scroll book?

A. She got on there the same way the others got on there.

Q. You remember whether you put additional names on the list?

2305  
A. I had three lists.

(p. 445) Q. Know whether you added any names?

A. I think two. M. C. Dixon and Isaac Duggins. He lived in Swift Creek Township and Dixon lives in Ayden Township.

Q. I call attention to the page in which M. C. Dixon and Isaac Duggins were added but without the township added. They were put on at your suggestion?

A. Yes, when I went through it I saw they were not on there.

Q. Are they negroes?

A. Yes, sir. So far as the township not being there that was a typographical error. Put on there to help the Sheriff out when he goes to summon them.

Q. Now you say that on the list you had M. C. Dixon and Isaac Duggins were not on there?

A. That is the best of my recollection.

Q. You had those names added?

A. Yes, sir.

Q. They are added out of alphabetical order?

A. Yes. It won't practical to type this over.

Q. Now let's look in the tax book and see if you can find M. C. Dixon and Isaac Duggin in the tax book?

A. Yes, I just saw Dixon's name awhile ago.

Q. M. C. Dixon is in line 1379 in the tax book?

A. Yes, sir.

Q. Let's look for Duggin in Swift Creek. You find Isaac Duggin in 6034?

(p. 446) A. That's right.

Q. Now if the list that you had didn't have those two names then the list you had was not made up from the tax ledger?

[fol. 64] A. I wouldn't say that. It's human to make mistakes. Anybody can leave out a name.

Q. You think M. C. Dixon from Ayden Township and Isaac Duggin from Swift Creek Township were just left out?

A. I am sure they were.

Q. Isn't it a fact that the list you had was made up from the voting registration list and not from the tax list and doesn't this help establish it?

A. No, sir, absolutely not.

Q. Did I ask you about the other names? What about J. W. Ormand and Mrs. J. W. Ormand?

A. I don't know.

Q. How did they get on the jury scroll?

A. Probably when I went to get help these people recommended them.

Q. What about Harvey Phelps?

A. Might have been the same way.

Q. What about John Thrower?

A. Don't know him.

Q. You remember specifically suggesting that two names be added?

A. Yes.

(p. 447) Q. You remember suggesting that any others be added?

A. No, sir.

Q. You remember adding any names at the request of anyone else?

A. No.

Q. Then how do you account for the names you don't know? People from Ayden Township who are on the jury scroll?

A. These two men who helped me probably recommended them.

Q. But you say you don't know of any name being added outside of these two mentioned? What I have, you had before you that list made up from the registration book and not from the tax book. If you can give me a better explanation I would like to have you do it.

A. I can't do it. It was made from citizens of Pitt County.

Q. Out of the whole five hundred and eighty nine names you came up with two you think were qualified in 1947?

A. Yes, sir.

Q. Look through Swift Creek Township and read off the names to us you think are qualified?

A. You already have Isaac Duggins. Matthew Garner, Line 656. I think that is it.

Q. You have one from there in addition to the one you have already mentioned?



A. Yes, sir.

Q. So that out of eight hundred and thirty eight people in your district there are only three that you thought were (p. 448) qualified?

A. At that time. That's right.

Q. Can you tell us why Matthew Gardner is not on the jury scroll book?

A. At that time I didn't think so.

Q. Didn't you understand my whole inquiry was as to who you thought was qualified in 1947?

A. I will withdraw it. I didn't know him well enough then to say he was qualified.

Q. Your testimony is that although you know him well enough now to say he is qualified you didn't know in 1947?

A. That's right. And with the information I had at hand I couldn't confidentially put him in the box.

The Court: What does he do?

A. Small farm, one-horse farm.

Q. You have been on this board since 1940, ten years?

A. Yes, sir.

Q. Chairman for two years?

A. Yes, sir.

[fol. 65] Q. Can you tell us how you happen to have a much lesser list of names for 1945?

A. Like everything else the courts are expanding and it takes more jurors. We had to go through a second time. We decided we didn't want to put that handicap on a person except every two years.

(p. 449) Q. What process did you go through with in 1945? And I will tell you that the record shows that the list of taxpayers was about fifteen thousand. How did you reduce that to approximately a thousand names in 1945?

A. I don't remember. I know about 1943.

Q. Tell us about that?

A. I went one day to the auditor's office. Mr. Cowan was auditor and tax supervisor, and asked where he was. They said he had gone to California. He had a son at the point of death.

Q. What did you do?

A. Went through the tax books.

Q. You will find for 1943—look at that since you helped get it up.

A. I didn't help. I did it all.

Q. I think you will find less than a thousand names?

A. Yes. As I told you we realized we didn't have enough.

Q. What did you do in 1943?

A. Went through the tax book.

Q. Go through that list in 1943 and tell us how many on there are negroes, if any?

A. I don't know whether I can do that.

Q. You may come down and I will recall you later.

(p. 451) M. W. SMITH, having been duly sworn, testified as follows:

Direct examination.

By Mr. Rogge:

Q. State your name?

A. M. W. Smith.

Q. Where do you live?

A. Greenville, Pitt County, N. C.

Q. How long have you lived there?

A. All my life.

Q. Hold any county office?

A. Member of the board of commissioners.

Q. From when to when?

A. From December, 1946 up to the present.

Q. Do you recall about the 1947 jury scroll?

A. I recall helping.

(p. 452) Q. Which are your townships?

A. Winterville and Chicod.

Q. Chicod is divided into four election precincts?

A. Four now. Three formerly and the fourth was added.

Q. You recall that Chicod has four voting precincts which make up Chicod Township and added to that you have Winterville Township?

A. That's right.

Q. Do you remember who represented Beaverdam, Faulkland and Fountain?

A. Mr. G. H. Pittman.

(p. 453) Q. On Chicod and Winterville tell what you did with reference to getting a list of names?

A. The names were handed to me and I scrutinized that list and of that list I selected those whom I thought were competent, those I knew to be competent. Of course I got some help.

Q. Who helped you?

A. L. C. Venters, Curtis Spencer, Heber Boone, Grover [fol. 66] Smith, Enosh Braxton, and Mr. Heber Porter might have but I am not sure.

Q. Are those people all white?

A. Yes, sir.

Q. You didn't confer with any negro members of the community?

A. I didn't at that time.

Q. You are familiar with the fact that the tax book is kept in white and negro sections?

A. Yes, sir.

Q. Turn to Chicod Township and turn to the list of negro taxpayers and read off to us the ones you think are qualified for jury duty?

A. At that time Manning Barnhill, Edward A. Chapman. There are two Sam Chapman and one I think is qualified, the older man. I think Paul Gatlin was qualified in 1947. Along then I used to see him. Haven't seen him in a number of years. I don't know whether he is still in that precinct or not. Otis Hawkins, Coon Moore, James Gray.

Q. You have given a list of seven people. I ask you if since (p. 454) from E. A. Chapman, who is on the registration list for Chicod Township No. 3, you can find any of these names in the jury scroll book?

A. This is not in here by townships.

Q. It is alphabetically by election precincts. You will find Chicod 1, 2, 3 and 4.

A. Edward A. Chapman.

Q. I said aside from E. A. Chapman who is on the voting registration list?

A. No, I don't find any.

Q. Aside from E. A. Chapman you don't find a single one of those names on there?

A. I don't find it.

Q. Well, I don't either. Isn't this due to the fact that the list you had before you was the list made up from the voting registration books and not tax book?

A. I am not prepared to say.

(p. 455) Q. For each township you had one alphabetical list?

A. I think so. Right opposite the name was given the township and number. Three or four precincts I had and it would number the township.

Q. You won't find 1, 2, 3, and 4 in the tax book?

A. I don't think so.

Q. You want to look?

A. I don't remember it being on there.

Q. In the tax book it is just "Chicod Township"?

A. That's right. Chicod Township, 1, 2, 3 and 4, that's the way it was on the list furnished to me.

Q. Suppose you look at Chicod in the tax book and see if it is divided into Chicod 1, 2, 3 and 4?

A. I don't recall that it was.

Q. Just Chicod Township?

A. Yes, sir.

Q. However, in the voting registration list it is "Chicod 1, 2, 3 and 4"?

A. That's right.

Q. Doesn't that satisfy you that what you had was a list made up from the voting registration and not from the tax book?

A. It does not.

[fol. 67] (p. 457) Q. You gave us seven names, Manning Barnhill, Edward A. Chapman, Sam Chapman, Paul Gatlin, Otis Hawkins, Coon Moore, James Gray as the ones you regarded as qualified?



A. I don't remember his name being on it. I just used the names on the list they gave me.

Q. This list you gave were names you regarded as qualified?

A. Yes, sir.

Q. If you had seen the name Manning Barnhill on the list you had would you have stricken it?

A. I don't think I would have.

Q. Sam Chapman?

A. No.

Q. Paul Gatlin?

A. Probably let it stay.

(p. 458) Q. Otis Hawkins?

A. I don't think I would have.

Q. Mr. Coon Moore?

A. I wouldn't say about him. I didn't know him very well at that time.

Q. Would you have stricken it?

A. I wouldn't say.

Q. What about James Gray?

A. I probably would not have taken his off.

Q. Did I ask you whether in making your check you consulted with any negroes in these communities?

A. No, I didn't.

Q. How many did you know in your townships who were on the list?

A. Colored people, negroes?

Q. Yes.

A. I don't know. I couldn't say.

Q. Let's take one more look. Would you go through Winterville Township and call off the names which you think in 1947 were qualified for jury duty?

A. I don't know but very few negroes in Winterville, very few.

Q. Did you check with anyone?

A. Yes, Mr. Enoch Braxton. He lived in Winterville and worked for the county and knew a lot of people.

Q. The tax list had three hundred and forty two negroes. Do (p. 459) you think you went over that many names?

A. I don't know. I went over the list I got with him for Winterville.

Q. Let's look at the list of those. Know S. T. Barrett?

A. No, sir.

Q. P. R. Cannady?

A. No, sir.

Q. O. D. Gardner.

A. No, sir.

Q. W. R. Roberson?

A. No, sir.

Q. You know none of those on the jury scroll from Winterville?

A. Yes, sir, asked him about all. Some of the whites I knew. I don't remember how many of the colored people I knew but I don't know many colored people around Winterville.

(p. 464) M. D. Hodges, recalled:

Re-direct examination.

By Mr. Rogge:

Q. You were telling us that you yourself had done the work on the 1943 list?

A. Yes, sir. I might have got some information in the office but I went over the books.

Q. Did I understand you to say you did the work?

A. Still I might have got some information in the courthouse. I am sure I did not having been on there long.

Q. What help did you have on that?

A. I don't remember. I probably solicited the Clerk of the Court and Register of Deeds and people in the Auditor's office.

Q. And your fellow county commissioners?

[fol. 68] A. Not when I was going over it.

Q. Is my estimate wrong? There are about eight hundred or a thousand names?

A. I didn't count the pages.

Q. On the tax list add white and negro together you find approximately fourteen thousand and a few hundred names. Will you tell me how you made the selections?

A. According to the ones I thought were qualified.

Q. And you went to the section of the tax list for white taxpayers first?

A. I don't remember about that.

(p. 465) Q. Do you find the names of any negroes on here?

A. There is probably right many on here. I recognize two or three. There are a lot of people, whites and niggers both have the same name.

Q. Have you any doubt if they have the same name you picked the one from the white list?

A. I don't remember now.

Q. What?

A. I don't remember.

Q. Find the names of all the negroes in this list?

A. I can't say I can do that.

Q. You said you found two or three?

A. I said I found all I recognized.

Q. This is what I thought you were going to be doing while you had this?

A. I did but I still can't identify them.

Q. You went through the list?

A. Yes, but some I couldn't tell the initials.

Q. I want those you can tell me you put on there as being members of the negro race?

A. Tommie Croom, James Anderson, Walter Green.

Q. Are there any duplicates? You know James Anderson who is white?

A. No.

Q. Who is the third one?

(p. 466) A. Walter Green. Walter Green and Croom are both dead now.

Q. That doesn't make any difference.

A. You might want to know why they are not on another year.

Q. Are there any others?

A. There is a lot in here I don't know whether white or negroes.

Q. I want to know all you put on the list because you knew they were negroes?

A. I can't remember everybody.

Q. I am asking you only those you can pick out?

A. Arthur Lee. I am of the opinion he is a negro. So far as identifying all of them I can't. I don't know whether they are Indians or Chinese.

Q. I am asking you the names of all those in there known to you to be negroes in the jury scroll which you say you helped get up yourself?

A. Yes, sir.

Q. And you have given us four names?

A. That's right.

Q. What about 1941? You were there also?

A. I haven't got much recollection about 1941.

Q. I call your attention to one thing on there. Let's start at the beginning. Ayden Township, White, 1941. Explain that for us.

(p. 467) A. I couldn't remember that. I hadn't been on the board long and I just don't remember. I have no recollection of it. I am sure I did then just like I did the rest of the time.

Q. You know how that notation got in there?

A. What notation?

Q. On the front page, "Ayden Township, White, 1941"?

A. A lot of people handled those books this week. I don't know who put it in there.

Q. The person who brought the book, it was in there when [fol. 69] he brought it.

A. You are asking me my opinion.

Q. See if you can find anyone in there in the 1941 list which begins "Ayden Township White", tell us whether you can find any in that list that you know to be negroes?

A. M. C. Dixon, Simon Dixon, Emanuel Chapman.

Q. Is that E. A. Chapman?

A. It is just Emanuel Chapman.

Q. You know Emanuel Chapman?

A. I don't know him.

Q. *Shey* did you list him?

A. I just told you I didn't recollect who was in there.

Q. The only thing we want is the names in the 1941 list that you know to be negroes?

A. M. C. Dixon and Simon Dixon, M. C. has had a stroke and Simon is dead.



(p. 468) Q. What about 1945? How much help did you get on that?

A. I don't remember.

Q. I am going to call your attention to another thing. Going back to 1947 do you notice this thing is divided into election precincts, Chicod (1), Chicod (2), Chicod (3), Chicod (4). If you look through you find Greenville (1), (2), (3), (4).

A. If you start to counting that you start to counting back from four to one.

Q. I will ask you a question that I think will be a little more difficult to answer than that one. You also see Grifton?

A. Yes.

Q. Can you find me Grifton in the tax register?

A. Yes, sir.

Q. Grifton township in this book?

A. No, you can't find one in this book?

Q. You find them listed as Grifton?

A. That was for identification.

Q. I am going to ask you if that doesn't indicate the 1947 list was made from the voting registration and not from the tax ledger?

A. I can't answer that. They might have listed that here and took part of the names off of the tax list and part off of that, I won't present when they assembled them.

Q. Is it a fact that prior to 1947 you took names nearly all from the white tax list and in 1947 what you had before you was a list of names from the voting registration list?

(p. 469) A. I don't know where it came from.

Q. What is your best answer?

A. My best answer is we told them where to get the names and a commissioner can't stay with folks twenty-four hours a day to see if they do it or not. We have to rely on their best judgment.

Q. And that is your answer to the question?

A. Yes, sir. When we gave the attorney and register of deeds instructions where to get the list that is all we could do. They had them ready for us.

The Court: You passed on the list handed to you?

A. That's right. After deleting a lot of names.

The Court: You took off some and added none?

A. I did add two or three. That was brought out this morning.

Mr. Rogge: That is all.

(p. 471) Re-direct examination of M. D. Hodges.

By Mr. Rogge:

Q. Can you give us the name of a single person in the jury scroll book for 1947 that didn't come from the voting registration list aside from the two names you gave us this morning. Dixon and Duggins?

A. I gave you those names.

[fol. 70] Q. Can you give us a single additional name?

A. If you see the name John Jones you don't know whether it came from the tax book or registration.

Q. I can tell you whether it came from the tax book. Can you give me a single additional name that didn't come from that voting registration book?

A. No, sir.

The Court: Mr. Hodges is excused.

(p. 472) J. D. JOYNER is recalled for further examination:

Re-direct examination.

By Mr. Rogge:

Q. Mr. Joyner, since you were here we have gotten some additional light on the list. Did you hear the testimony of Mrs. Wheelless and her associates?

A. No, sir.

Q. Did they get up a separate additional list or their own from the tax list?

A. I didn't hear them say that.

Q. I ask you whether it is a fact?

A. You want me to state whether they made a separate list from the tax book?

Q. For 1947..

A. In preparation of the jury list?

Q. That's right. . .

A. Originally started with the registration books.

Q. And Mrs. Goodwin brought you a list made up from that?

A. And then the tax book was gotten from the tax officer and the list the young ladies in the office made was a list which they checked the names on the tax book against the names on the registration books for the purpose of getting names that were not on the registration books, in order to integrate a complete list of the two.

Q. So that I can get your best recollection, their testimony was pretty positive that they got up an additional list of their (p. 473) own on which they spent a long period of time. Isn't it a fact you handed up two different lists?

A. I don't remember seeing them.

Q. Your recollection is what?

A. That we compiled one list from the two sources.

Q. Look at this 1947 list. Go through that. I want you to observe as you go on Chicod 1, 2, 3, and 4, and then look on and see whether you don't find Greenville 1, 2, 3, and 4, and then go on and see if you don't find Grifton Precinct?

A. Excuse me a minute but so many names I can't find them all at once.

Q. Chicod 1, 2, 3, and 4, Greenville 1, 2, 3 and 4, and Grifton. See if you don't find all of them in there?

A. I have Farmville Township, and you will note if you will—

Q. If you will follow my questions. Can you find Chicod 1, 2, 3 and 4?

A. I do.

Q. And Greenville 1, 2, 3 and 4?

A. I haven't gotten there yet. Yes, I find Greenville 1, 2, 3 and 4.

Q. Now find Grifton for me?

A. I find Grifton.

Q. Grifton is not a township?

A. Not unless it has been changed recently.

(p. 474) Q. You won't find Grifton?

A. Not as a township.

Q. Grifton election precinct is divided into two townships, [fol. 71] Ayden and Swift Creek?

A. To the best of my knowledge.

Q. Part in one and part in another?

A. Yes, sir.

Q. If you had a list based on the tax list you wouldn't have it divided into these precincts?

A. If based on that alone.

Q. Aside from three names, Duggin and Dixon, which are at the end of Grifton, have been added out of alphabetical order?

A. Yes, sir.

Q. And the name of Wimberly, which you find at the end of Belvoir, I want you to point to a single additional name out of more than five thousand names of negroes listed in the tax list for 1946 that have been added to the list which you hold in your lap?

A. I am going to ask you to restate that question.

Q. You got a list from Mrs. Goodwin based on the voting registration?

A. That's correct.

Q. And you say names were added to that?

A. Yes, I said that.

(p. 475) Q. Aside from the names Dixon and Duggin, which Mr. Hodges says he added at the end of the list, and Wimberly at the end of Belvoir, point to a single additional name in the more than five thousand in the negro portion of the 1946 tax list that you will not find in the voting registration books?

A. I don't know that I could tell the difference between negro and white. I can find them on that book there because they are distinguished.

Q. Can you turn to this book which contains the names of more than five thousand negro taxpayers and find me the name, aside from those three, the name,—and you can tell whether they are negroes in this book,—find me the name of a single additional person that was added to that list which is not in the voting registration?

The Court: Won't he have to check it?

Mr. Rogge: That is what we have done and we want him to.

The Court: You have it in evidence and unless that is attacked. I am not telling you what to put in and I don't



want the saying of time to be the paramount consideration but I know it would take him a good while to do that because it took Mr. Gordon and several assistants a good many hours. I am going to accept those figures unless something is shown to the contrary.

Q. Isn't it a fact you didn't use the tax list at all?

A. No. I can prove that. For example in Farwayville section (p. 476) of the jury scroll there are two divisions. It starts off "J. I. Abernathy" and goes down a ways and comes here and starts with "Abrams". Two divisions. It is apparent to me that the first list taken off of the registration book and this second list the names on the tax book that were not on the registration books:

Q. Negro names?

A. I don't know whether negro or white.

Q. I am asking you for the negro names.

A. I am not prepared to say what are negro names and what are white names.

Q. You went to the voting registration where they are checked white or negro?

A. I don't know. It was brought out the other day that they were.

Q. Take a look at them?

A. Yes, they have white and colored with a check.

Q. Your tax list you know is divided into white and negro?

A. That's correct.

Q. So by using these two against the jury scroll book you will have no difficulty in picking out names that you know to be negro?

A. They could be checked.

[fol. 72] Q. I ask you whether aside from these three names you can find me any?

(p. 477) A. I can't say because I haven't checked them for that purpose. If there I don't know whether they are or not. I haven't had occasion to check the list for that purpose.

Q. Isn't it a fact that the list Mrs. Wheelless and her associates made got lost somewhere in the shuffle?

A. Absolutely not.

Q. How do you account for only three additional names, and Mr. Hodges accounts for two and that leaves us one?

A. I have no way of telling. I had nothing to do with that.

Q. They say you made up a list. Did you hear the testimony of Mr. Perkins this morning who went through the tax list and gave us the name- of twenty seven additional people he thought were identified aside from four which were registered voters and not a single one appeared on the jury scroll?

A. If he said it I heard it.

Q. How do you account for that?

A. I didn't lose the tax list.

Q. What happened to it?

A. This is the list.

Q. That is not that list unless you can find me some names. That list of names, and you check it yourself, that list of names is your voting registration list and aside from the three names I have called to your attention, two of whom, Duggin and Dixon, Mr. Hodges says he added to the list, you will not find aside from Wimberly, additional names from more than (p. 478) five thousand that appear in the tax list?

A. I can explain it. My job was to prepare the list for the commissioners. It was not for me to judge whether they should remain on that list or not.

Q. The inference I draw from it, and you can make any explanation you want, is that what you turned over to the commissioners was what Mrs. Goodwin prepared for you—

Objection by Respondent to the inference.

and not the tax list?

A. I understand you are saying what I did was take the list Mrs. Goodwin made from the registration book and that alone and that list alone is what I turned over to the commissioners. You are absolutely incorrect in that inference.

Q. I would like for you to explain.

A. I can show names on here but I can't say whether they are negroes or whites. There is no distinguishing marks on the record.

Q. There is distinguishing mark on the registration?

A. Yes, sir.

Q. And in the tax list?

A. Yes, sir.

Q. So that in the two sources there are distinctions?

A. Yes, sir.

Q. You can't give me any better explanation than the one already given why there are not more than the three additions?

(p. 479) A. I don't know why the names are not there. I made up the list from both books and it was turned over to the county commissioners as such.

Q. That is the best you can say as to why none of the five thousand names, aside from the three I mentioned, are on there?

A. There is no way I could say why.

That is all.

• \ • • • • •

(p. 484) Sheriff Tyson recalled:

Recross-examination:

Q. You never saw a negro on the grand jury in Pitt County?

[fol. 73] A. I don't recall that I have.

• • • • •

(p. 493) Mr. Moody: We have both freely referred to the transcript, the answer refers to the record proper Pitt County, the transcript and various motions, petition and application for certiorari. They were filed with the answers. This was stipulated to. Do we understand, or would Your Honor make any ruling that the whole previous record is in?

The Court: I understand it is already in.

Mr. Rogge: I will agree this is the record made in that case and the people were called and so testified and I am perfectly happy to stipulate if the persons called were called would give the same answers. I don't want to be bound by saying it was offered.

The respondent offers in evidence the four volumes of testimony elicited in the Superior Court of Pitt County, including the verdict and findings of the Court and other materials contained therein, being the same four volumes

which are the subject of the stipulation which appears of record in this case.

### Close of Evidence

At the close of all the evidence the respondent renews objection to all the evidence received during the course of the hearing and moves to strike all of it from the record. The objection is overruled and the motion is denied.

(p. 494) The respondent renews his motion to dismiss. The motion is overruled and denied.



# United States Court of Appeals

For the Fourth Circuit

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**No 6330**

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**LLOYD RAY DANIELS and BENNIE DANIELS,**  
**Petitioners-Appellants**

**against**

**JOSEPH S. CRAWFORD, Warden, Central Prison**  
**of the State of North Carolina, Raleigh, N. C.,**  
**Respondent-Appellee**

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## **APPENDIX TO RESPONDENT-APPELLEE'S BRIEF**

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W. W. SPEIGHT (Federal Transcript) TESTIFIED AS  
FOLLOWS:

### DIRECT EXAMINATION

- Q. State your name and business?  
A. W. W. Speight, an attorney of Greenville.  
Q. How long?  
A. I started in 1939, interrupted by the war years and resumed in 1946 and until now.  
Q. Received your education where?  
A. LLB University of North Carolina. Undergraduate work at the University.  
Q. Serve any state office?  
A. Institute of Government doing criminal law research, and Attorney General law office.  
Q. What do you do now?  
A. Practice law in Greenville, James and Speight.  
Q. The record in the State Court shows you and another attorney were appointed at the March Term, 1949

versely to petitioners in the State Courts, and being dissatisfied with these decisions, the petitioners are simply asking the Federal Court to use the writ of *habeas corpus* as a substitute for an appeal and thereby retry the issues again. In other words, the Federal Court, according to petitioners' concepts, would be a super court of appeals. We think we have clearly shown that this is not the proper use of *habeas corpus*. The petitioners had open to them a review of all of these questions by the Supreme Court of North Carolina. The same method was open to petitioners for their review as is open to all of the people of the State who may be convicted in criminal courts of the State. The petitioners did not avail themselves of their rights as to this review, and, as we see it, they cannot now complain and assert that they are entitled to retry the case in the Federal Courts, especially since the Supreme Court of the United States, having before it a record of all the proceedings and knowing the seriousness of the situation, saw fit to deny petitioners' application for a writ of *certiorari* in that Court.

Respectfully submitted,

HARRY McMULLAN,  
Attorney General  
of North Carolina.

RALPH MOODY,  
Assistant Attorney General  
of North Carolina.

R. BROOKES PETERS, JR.,  
General Counsel of State  
Highway & Public Works  
Commission.

E. O. BROGDEN, JR.,  
Attorney for State Highway  
and Public Works  
Commission.

Attorneys for Appellee

Superior Court of Pitt County to defend the petitioners, Lloyd Ray Daniels and Bennie Daniels?

A. That's correct. I was appointed to defend Lloyd Ray Daniels and Mr. A. B. Corey was appointed to defend Bennie Daniels.

Q. Do you remember when they were arraigned?

A. Yes, sir.

Q. Had you been appointed when they were arraigned?

A. Yes, sir.

Q. And entered pleas to the bill of indictment?

A. Yes, sir.

Q. The record shows you didn't move to quash.

OBJECTION BY PETITIONERS. OBJECTION OVER-  
RULED.

MR. ROGGE: Why previous counsel may or may not have done anything, why a lawyer didn't do something which I think under the circumstances should have been done—

A. I didn't move to quash because I knew the grand jury, most of the members personally, knew the foreman, and considered they would give fair consideration to the evidence.

Q. What county were you born and reared in?

A. Born in Pitt County, moved away and spent most of my life in Nash County.

Q. Did you know the trial panel?

A. Yes, sir.

Q. Reasonably familiar with them?

A. Yes, sir.

Q. For what reason did you not challenge the array of trial panel?

A. For the same reason.

Q. You knew Mr. Corey?

A. Yes, sir. He had been appointed to defend Bennie Daniels.

Q. Where was he born and raised?

OBJECTION BY PETITIONERS TO EACH AND EVERY QUESTION ALONG THIS LINE AND EACH AND EVERY OBJECTION IS OVERRULED.

A. He was born and raised and lived all his life in Pitt County with the exception of the first World War.

Q. He is dead now?

A. Yes, sir.

Q. What office had he held in the General Assembly?

A. He had served in the Senate a number of years.

Q. Can you give us some information about his acquaintance with the people of Pitt County?

A. It was very wide.

Q. Had he to your knowledge campaigned over the county?

A. Several times.

Q. Do you have an opinion as to his competency as an attorney?

A. I would say very good. He was a good trial lawyer.

Q. Wasn't he very well acquainted by knowing people by name in Pitt County?

A. He was.

DR. IRA C. LONG (Federal Transcript) TESTIFIED AS FOLLOWS:

#### DIRECT EXAMINATION

Q. Do you hold any position with the State of North Carolina?

A. Yes, Superintendent of the State Hospital at Goldsboro.

Q. What type of institution?

A. For the insane.

Q. Maintained exclusively for Negroes?

A. Yes, sir.

Q. How long have you held that position?

A. A little over four years.

Q. You were holding that position in February, 1949?

A. Yes.



Q. Did you ever have occasion to examine Lloyd Ray Daniels and Bennie Daniels?

A. Yes.

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Q. How did these petitioners happen to be in your custody?

A. They were sent in from Pitt County for thirty days study.

Q. You know by what authority?

A. The Judge. They usually send them in.

Q. You know who the Judge was?

A. I think it is in the record.

THE COURT: Do you know?

MR. TAYLOR: Judge Parker.

Q. You are in charge of the institution?

A. Yes, sir.

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#### QUESTIONS BY MR. MOODY:

Q. Did you write this letter to the Clerk of the Superior Court?

A. Yes, I did.

Q. And it was your conclusion that they were both mentally competent to be put upon trial and that they knew right from wrong?

A. Yes, sir.

Q. And it is your conclusion from your examination that if anyone can think they could tell whether they had killed a man or not. They got that much mentality?

A. Oh, yes.

Q. And they could relate a narrative of what happened if they wished to do it?

A. Yes, sir.

Q. You saw no defect in their recollection?

A. No, sir, except for their judgment.

Q. They wouldn't have as good judgment?

A. No, sir.

Q. They wouldn't have as good judgment as some higher educated person?

A. No, sir.

SHERIFF RUEL W. TYSON (Federal Transcript) TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

Q. You are Ruel W. Tyson, Sheriff of Pitt County?

A. Yes, sir.

Q. Do you remember the arrest of these two petitioners?

A. Yes, sir.

Q. Were you present when Lloyd Ray was arrested?

A. Yes, sir, I was.

Q. He was the first one arrested?

A. Yes, sir.

Q. When and where was Lloyd Ray arrested?

A. Lloyd Ray was arrested on Sunday night between one and one-thirty on the L. C. Whitehurst farm in the Stokes Section of Pitt County.

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Q. Did you go to the house yourself where he was found?

A. Yes, sir, I did.

Q. In company with whom?

A. In company with Deputy Sheriff Manning, Deputy Sheriff Mills, Al. Dorsey, M. M. Corbett, police officer, and S. G. Gibbs, who was patrolman at that time.

Q. All of you go to the house at the time?

A. Yes, sir.

Q. Where did you find Lloyd Ray Daniels?

A. In this house, tenant house.

Q. Where in the house?

A. He was lying on a bed or couch one, I don't know which.

Q. Dressed or undressed?

A. He was fully dressed.

Q. What time was that?

A. Between one and one-thirty.

Q. Was he taken in custody at that time?

A. Yes, he was.

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BY THE COURT:

Q. Remember what was said in the house?

A. I told him he was under arrest. He wanted to know what for. I told him for the murder of Benjamin O'Neal.

Q. State what was said on the way to the car about any statement he might make?

A. I don't think anything said about any statement until after we got in the car.

Q. What was said then, if anything?

A. After he was put ~~in~~ the car with Mr. Manning, Mr. Gibbs and myself. Lloyd Ray on the back seat and Mr. Gibbs on the back seat. I was on the front seat, right hand side. Mr. Manning was driving. On the way to Williamston we talked to him some. I did some of the questioning and Mr. Gibbs did some. I don't think Mr. Manning did. We hadn't got very far from where he was arrested before he began to tell us about the crime and how it was committed and all about it.

Q. Did anybody offer him any violence?

A. No, sir.

Q. Anybody attempt to?

A. No, sir.

Q. Anybody make any threats?

A. No, sir.

Q. Anybody offer him any inducements?

A. No, sir.

Q. State whether or not he was warned or anything said to him with respect to what he said would be used against him?

A. Yes, sir, I warned him and told him he didn't have to make a statement, that any statement he did make would be used against him in court.

Q. When was that?

A. After he got in the car.

Q. Was that before he made any statement?

A. Yes, sir.

(DIRECT EXAMINATION RESUMED)

Q. You say it was shortly after you pulled off in the car?

A. Yes, sir, after we got him in the car. I think that's correct.

Q. How long after that before he told you about it?

A. I couldn't say exactly how long. I say not but a very few minutes.

Q. State what he told you?

A. I don't know as I could state it word for word unless I could refer to the statement.

THE COURT: Tell us the best you can.

A. Lloyd Ray said he and Bennie were in Greenville together, had drank some whiskey, had been on Bonner Lane and gotten in a fight with some men and that he had cut this man and he had some blood on his clothes.

Q. Which one?

A. Lloyd Ray, and that they left down there and come to the bus station. The bus hadn't come. They decided to get a taxi. They got a taxi to take them home. Left Greenville, went out 264 towards Washington, turned off of the highway up a dirt road. This road leads North from the highway. Went down the dirt road some little distance, turned back to the right and down this road. He said Bennie told the taxi driver to turn up in the barn yard, that they couldn't turn beyond the barnyard for the road was bad. They turned up into the barnyard and Bennie held a knife around O'Neal's neck.

Q. They didn't call his name, did they?

A. I believe they called him taxi driver. I am not positive. And he took his money out of his pocket.

Q. Did he say where each were sitting, front or back?

A. I believe he said he was sitting side of O'Neal and Bennie in the back, behind. I believe that is correct.



And they got out of the car. Said O'Neal had a knife. They got in a fight and tussel, fought some on the ground and got in the tobacco barn and had quite a scuffle there and come out of the barn and had quite a scuffle. That they knew when they left him he was dead.

- Q. Did he say why they assaulted him?  
A. He said they assaulted him to get what money he had.  
Q. Was there any reluctance on the part of Lloyd Ray to make that statement?  
A. No, sir. After he started talking he talked as freely as anyone I ever talked to.

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- Q. Were you present when Bennie was arrested?  
A. Yes, sir.  
Q. Where was that?  
A. Bennie was arrested approximately a mile or two East of Winterville on Bryant Tripp's farm at the home of Moore around five o'clock in the morning, Tuesday morning. I went in the house and when I got in the house there was a man in the first room that I entered. I went in the room to the right and Bennie was standing behind the door fully dressed with his hat on.  
Q. What did you do with him?  
A. Put him under arrest. Told him he was arrested for the murder of Benjamin O'Neal. We took Bennie to Greenville, changed cars and took him to Williamston, Mr. Ray Smith, Gibbs and Dorsey. Mr. Ray Smith was a fireman. He was driving my car for me.  
Q. Did Bennie make any statement en route to Williamston?  
A. Yes, sir, he did.  
Q. Who was in the car that he rode to Williamston in?  
A. Gibbs, Dorsey, Smith and I.  
Q. State whether any threat or attempted violence was used on him?  
A. No, sir. There was no threats or violence of any kind.

- Q. Any inducement?
- A. No, sir.
- Q. Hope of reward?
- A. No, sir.
- Q. Was he told it would be easy on him?
- A. No, sir.
- Q. What was he told?
- A. I warned him he didn't have to make a statement unless he wanted to and whatever statement he did make would be used against him in court.
- Q. Was this said while traveling on the way to Williamston?
- A. Yes, sir. When we arrested him I took him by not very far from where his father lived, took him by his father's home. Someone came to the door, I don't know whether his brother or father, and I told him we had Bennie under arrest.
- Q. Did Lloyd Ray's people know he was arrested?
- A. I don't know. I hadn't seen his people.
- Q. What did Bennie say on the way to Williamston?
- A. This might not be the exact words but he told us that he and Lloyd Ray had gotten a taxi in Greenville.
- Q. He tell you anything about what had happened before they got the taxi?
- A. Told us he had been to Bonner Lane and gotten in a fight there and come over there to the bus station and got a taxi to take them home. After they went out 264 several miles they went up this dirt road, then turned up the road, then drove up in the barnyard and that he threw a knife on O'Neal and Lloyd Ray put his belt around O'Neal's hands, that they got out of the car. Bennie said he pulled O'Neal out of the car and Lloyd Ray got out of the car under the steering wheel and they had quite a tussel on the ground and into the tobacco barn. I asked him if he cut O'Neal. He said he didn't know, that they were in the tobacco barn in the dark and he didn't know whether he cut him or not. But he said he hit him one time with a brick and

one time with a railing that came off of a tobacco truck and also hit him with some tobacco sticks.

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Q. Getting up to the night the written statements were made. The jail in Williamston is upstairs?

A. Yes, sir.

Q. Did you go up there with them to bring Bennie down?

A. No, sir, I didn't.

Q. One of them said you signed one of their names?

A. No, sir, I didn't.

THE COURT: I believe Lloyd Ray said the Sheriff made his mark. Didn't he say yesterday he made the mark himself?

Q. Did you write either one of their names or make either one's mark?

A. No, sir.

Q. The statement made in Williamston in the courthouse, were they together then?

A. Lloyd Ray was brought down from jail first and later Bennie was brought down. It was in Sheriff Roebuck's office in Williamston. Two rooms to the office. Partition door between the two rooms and this door was open between the two rooms.

Q. Why was the statement made there again?

A. To get it in writing.

Q. At that time was any inducement offered either or one of them to make a statement?

A. None whatsoever.

Q. Any threat or attempted violence?

A. There was not.

Q. Or hope of reward?

A. No, sir. Both talked just as freely all the way through about it.

Q. Did anybody slap anybody?

A. No, sir. Nobody did any cursing.

Q. Who took down their statements?

A. Mr. Arnold.

Q. He is clerk to the city police, or was at that time?

A. Yes, sir, file clerk I believe.

Q. What was done then with respect to the statements?

A. Mr. Arnold typed them.

Q. Then what happened?

A. The statement was read to Lloyd Ray. Bennie was in the room when it was read. Lloyd Ray said he couldn't write. I believe Mr. Page wrote his name and Lloyd Ray touched the pen and made his mark. Bennie's was read to him. They were both asked if that was what happened. Both said it was. Then I asked them both if anybody had offered them any reward or promised them anything, or threatened them, or even cursed them. Both stated they had not been mistreated in any way, that the officers had been very nice to them all the way through.

Q. Did they remain there that night?

A. After this was done they were taken on a car by Deputy Sheriff Manning and Gibbs and taken to Raleigh.

Q. Did you go?

A. No, sir.

Q. At any subsequent time did you talk to either or both?

A. Before the September term of court Dorsey, Manning and I went to Raleigh, got Lloyd Ray and Bennie, and brought them to Wilson. On the way to Wilson I took the clothes they had in possession, had on the night it occurred, stopped on the side of the highway, took the clothes out. Each one pointed out which ones he had on, shirt, pants, etc., and both very freely admitted the crime that had been committed. Told us what had happened. Both cried about it. Said they were mighty sorry they were in it, that they would never have done it if they hadn't been drinking. Talked very freely about it.

Q. Make any statement at any other time in your presence?

A. I believe that is the last time I talked to them.



THE COURT: You brought them from Raleigh to Wilson?

A. Yes, sir.

Q. On this trip down from Raleigh was that when you were bringing them to court?

A. Yes, sir.

Q. To be arraigned?

A. Yes, sir.

Q. State whether or not any threat or violence or offer of violence or inducement was offered?

A. There was not.

Q. Were any questions asked or were these statements made voluntarily?

A. They were made freely and voluntarily. They talked about it very freely.

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Q. State whether they ever said anything to you about an attorney or to see one?

A. No, sir, never did.

G. M. JOHNSON (Federal Transcript) TESTIFIED AS FOLLOWS:

#### DIRECT EXAMINATION

Q. What is your name?

A. G. M. Johnson.

Q. Where do you live?

A. Goldsboro.

Q. By whom are you employed?

A. The State of North Carolina.

Q. In what capacity?

A. Society worker State Hospital at Goldsboro.

Q. Were you so employed in May, 1949?

A. Yes, sir.

Q. As such did you see Lloyd Ray Daniels and Bennie Daniels while they were at that institution?

A. I did.

Q. Did Lloyd Ray make a statement with respect to this alleged killing in your presence?

A. He did.

\*\*\*\*\*

Q. Explain the circumstances under which Lloyd Ray came to make a statement to you?

A. He just came to the office, a person brings him to the office and I talk with him and get very little information. I don't try to push them because it is immaterial. If they voluntarily give it. I remember one day they said there was a man there from Greenville on whose place Lloyd Ray was raised and practically raised by this man who would like to see me. I am sorry I have forgotten his name. He said he would like to talk to Lloyd Ray. After talking to him he came back and said he would also like for me to talk to Lloyd Ray and perhaps he would tell me what he told this individual. Both of us went to the criminal building and while sitting on a cot he divulged the information I wrote down.

Q. Did he give information in response to questions by you?

A. The door was closed and this individual said, "Lloyd Ray, you tell Mr. Johnson what you told me." Without any further question he went through with it and after it was all over this individual said, "That is what he told me."

Q. Did you reduce that to writing?

A. I did.

Q. State whether that is a copy or report of that conversation or statement to you? (Shows the witness a paper)

A. It is.

Q. Did you make that yourself?

A. I did.

Q. You say "The patient calmly related the following—" and from there on is that what he said in your presence, Lloyd Ray?

A. Yes, sir.

The statement of Lloyd Ray Daniels, identified by G. M. Johnson, is introduced in evidence by respondent and is marked "R-2".

ROY PEEL (Federal Transcrip) TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

Q. You are Mr. Roy Peel?

A. Yes, sir.

Q. Where do you live?

A. Williamston, Martin County.

Q. What do you do there?

A. Jailor and deputy sheriff.

Q. How long have you held that position?

A. Since 1933.

Q. You served under Sheriff Roebuck?

A. Yes, sir.

Q. Where is he?

A. Dead.

Q. You remember the occasion when officers of Pitt County brought Lloyd Ray Daniels and Bennie Daniels to your jail?

A. I do.

Q. Were you present on Tuesday or Tuesday night that they came down there and talked to them?

A. I was present part of the time.

Q. What particular time?

A. I taken them in and out of the jail, down to the adjoining office of the Sheriff. Sheriff and Patrolman's office side by side.

Q. Did you bring them down that night?

A. Yes, sir.

Q. Who else went up there with you?

A. Deputy Sheriff Manning, I think.

Q. Did you and Deputy Sheriff Manning bring them both down?

A. One at the time.

- Q. State when you went up to get them if anything was done,—if he was struck or slapped?

OBJECTION BY PETITIONERS TO LEADING QUESTIONS. OBJECTION OVERRULED.

- A. Came up there and wanted to talk to them. Sheriff Roebuck sent up there after them.  
 Q. Anything take place when you went up after them?  
 A. No, sir.  
 Q. Did you or Manning strike them or threaten them?  
 A. No, sir.

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- Q. Did you hear anybody threaten or strike anybody or threaten them or tell them it would be better to tell?  
 A. No, sir.  
 Q. Hear an officer say anything like that?  
 A. No, sir.

L. D. PAGE (Federal Transcript) TESTIFIED AS FOLLOWS:

#### DIRECT EXAMINATION

- Q. You are Mr. L. D. Page?  
 A. Yes, sir.  
 Q. At this time we are talking about you were policeman in Greenville?  
 A. Yes, sir.  
 Q. Did you go to Williamston with Sheriff Tyson and Sheriff Manning on the night we are talking about?  
 A. Yes, sir.  
 Q. Did you go upstairs in the jail?  
 A. I did not.  
 Q. Did you slap or hit Bennie up there?  
 A. No, sir.  
 Q. Did you slap or hit either one of them at any time?  
 A. I did not.



OBJECTION BY PETITIONERS TO LEADING QUESTIONS.

Q. State whether you were there when they made the statements in the Sheriff's office?

A. I was.

Q. State whether you or any other person either threatened them, offered any violence or intimidation to make a statement or any hope of reward that it would be better for them to make a statement or anything of the kind?

A. We never offered them any reward or threatened them no way, shape, form or fashion. The statements were free and volunteer, as much so as you and I talking in this room.

Q. State whether they were reluctant or hesitant to make the statements?

A. They were not. They were very open and free with their statements.

Q. State whether they were told by anybody whether they would have to make any statement?

A. They were told they didn't have to make a statement.

Q. By whom?

A. By the Sheriff.

Q. What else did he tell them?

A. That they didn't have to sign the statement after it was made. To explain that statement, there has been a great to-do about the beginning of the statement. I dictated that statement which warned them of their rights there in the beginning of the statement that it would be use against them in court, first paragraph.

Q. Do you know whether or not you dictated the last paragraph?

A. I dictated the last paragraph. The reason for the second page, there was not enough room on the first page to close it and have the signatures. If you will bring me the statement I will explain that clearly. This is Bennie Daniels' statement, "I, Bennie Daniels, of my own free will and without promise of reward or threat of

bodily harm, and after being told this instrument can be used in court against me, make the following statement". By that, it was put in there so he wouldn't make it if he didn't want, to and then he made the following statement. From there on he dictated it until the last paragraph which wouldn't give room for the signatures on this page: "The foregoing statement was made and signed by me this 8th day of February, 1949, in the Sheriff's office in Martin County, before the following officers, whom I know to be officers of law." I was giving him another chance to know he was dealing with officers and it was going to be used against him in court.

THE COURT: That was Tuesday?

A. Yes, sir.

(Answer continued)

Then we asked him would he sign it and he said that he would and he signed it and we witnessed it. That was after I read the full statement back to him.

Q. Who read the statements back to them?

A. I read both of them. They were both present at the time of the reading of each one of the statements.

THE COURT: Did either one of them say anything when you completed the reading of his statement?

A. Said the statement was correct, or words to that effect, that it was like it was, or something to that effect.

Q. Do you remember at the other trial if you were asked to stand up and Bennie was asked if you were the one that slapped him?

A. Yes, sir.

Q. What did he say?

A. He said I was not the one.

THE COURT: Did he identify the one he claimed did slap him?

A. He did not. He couldn't figure out the one in the court room. There was never a harsh word said to those

boys in my presence. Our voices were not raised at all to those boys.

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### RE-DIRECT EXAMINATION

Q. In reading the statements back to them state whether you read the whole thing including the introductory paragraph, which you say you dictated, and the closing paragraph?

A. I did.

Q. State whether you signed either one of their names?

A. I signed Lloyd Ray's name and he made his cross mark. That is all.

RAY SMITH (Federal Transcript) TESTIFIED AS FOLLOWS:

### DIRECT EXAMINATION

Q. In 1947 were you living in Greenville?

A. Yes, sir.

Q. What was your work?

A. Fireman.

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Q. Were you present in the car when Bennie Daniel made a statement with respect to what he did?

A. Yes, sir.

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Q. Who was in the car with you and Bennie on the way to Williamston?

A. Mr. Gibbs, Mr. Tyson, myself, Captain Dorsey and Bennie.

Q. State whether anyone in the car offered Bennie any violence or put him in any fear or offered him any inducement to make a statement?

A. No, sir, I didn't hear anyone make a statement of any reward or anything toward a statement.

Q. Anybody hit him?

A. No, sir.

Q. Anybody threaten to hit him?

A. No, sir.

Q. Anybody in the car say it would be better for him to make a statement?

A. I don't recall.

Q. How did he come to make a statement?

A. Mr. Tyson asked him did he have anything to do with it. He said yes, but Ola Ray had more to do with it than he did.

Q. Ola Ray?

A. Lloyd Ray, the large one.

Q. Did you have anything further to do with it?

A. No, sir.

Q. State if you recall whether Sheriff Tyson or anyone in the car warned him about whether he should make a statement it would be used against him?

A. No, sir.

Q. You didn't see the other one?

A. No, sir.

S. G. GIBBS (Federal Transcript) TESTIFIED AS FOLLOWS:

#### DIRECT EXAMINATION

Q. You are Mr. S. G. Gibbs?

A. Yes, sir.

Q. Where do you live?

A. Greenville.

Q. When those men were arrested what position did you hold?

A. Patrolman with the State Highway Patrol.

Q. You are now with the State Bureau of Investigation?

A. Yes, sir.

Q. Do you recall the time Lloyd Ray Daniels and Bennie Daniels were arrested?

A. Yes, sir, I do.

Q. Were you present when Lloyd Ray Daniels was arrested?

A. Yes, I was.



Q. Who was with you?

A. Captain Dorsey, of the Greenville Police Department, Sheriff Tyson, Deputy Sheriff Mills and Deputy Sheriff Manning and Mr. Corbett.

Q. You remember where he was arrested?

A. At a tenant house on the L. O. Whitehurst farm near Stokes.

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Q. Were you armed?

A. Yes, sir.

Q. What did you have?

A. 38 Colt revolver.

Q. What was the color or finish?

A. Nickel or chrome.

THE COURT: Appearance of silver?

A. Yes, sir.

Q. Whitish silver?

A. Yes, sir.

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Q. Did you talk with Lloyd Ray?

A. Yes, started towards Williamston with him.

Q. You recall whether Sheriff Tyson said anything to him?

A. We started questioning him as to where he was on Saturday night. Sheriff Tyson told him when we started questioning him he didn't have to make any statement, that anything he said could be used against him, or words to that effect.

THE COURT: Was that after you got in the car?

A. Yes, sir. He won't questioned en route from the house to the automobile so far as I recall. I won't right close to him. We were all in a group.

Q. It is in evidence in the former trial when the petitioners testified, and at this hearing, that you made certain statements and threats to the petitioner, Lloyd Ray Daniel, had your hand on your pistol and made certain threats to shoot him if he didn't tell what you wanted

him to tell, and it is also in evidence that you told him if he wanted to see his mother again, or he would never see his mother again. Tell the Court what you said along those lines?

- A. No threats were made to Lloyd Ray concerning the statement. Questioned him on where he was Saturday night and we had some other information and asked him why he sent his mother word to burn his clothes before the cops got them.

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Q. You stated you were in an automobile and didn't strike the petitioner, Lloyd Ray Daniels, or make any threats?

A. No, sir.

Q. Did you put your hand on your pistol?

A. No, sir, I didn't. After we started questioning him he said he might as well go ahead and tell us the truth about it. Then he told us that Saturday night around eight-thirty—

Q. Where were you?

A. In Mr. Manning's car on the way to Williamston. He said he got on a taxicab in Greenville and that Bennie Daniels was with him. That they went out on the Washington highway to the Arvon farm, stopped at some tobacco barns. That when they stopped there Bennie threw his knife around the driver's neck and told him to get the driver's money and they went out. That the driver jumped out of the taxi on the driver's side and he, Lloyd Ray went out on the driver's side, and they had a tussel, were hooked up, went in the tobacco barn and came back out and after he fell on the outside they beat him over the head with some tobacco sticks. That was his first statement concerning the crime.

Q. Did you make any notes of what he said?

A. Yes, sir, I did.

Q. Did he sign the notes?

A. I asked him if he would sign it. He said he couldn't

sign his name. I asked him if he would make his cross mark and he did that.

Q. Were those notes produced in the trial at Greenville?

A. Yes, sir. That is one of the exhibits.

THE COURT: Is that in the record?

A. Yes, sir.

Q. Tell what happened about the car?

A. We got out on the hard surface and after we passed through Robersonville the car broke down and we had to call a car from Williamston to come and pull us to the police station at Williamston.

Q. You didn't talk with him any more at Williamston?

A. No, sir.

Q. Were you present when Bennie Daniels was arrested?

A. Yes, sir.

Q. Where was that?

A. On a farm a mile or a mile and a half East of Winterville. A man named Moore whose house we arrested him in.

Q. Did you go in the house when he was arrested?

A. Not in the beginning.

Q. You did later on?

A. Yes, sir.

Q. Was he dressed?

A. He was in the living room at the time I saw him, putting on his shoes or tying his shoes.

Q. Were you present in the car when he was carried to Williamston?

A. Yes, sir.

Q. You talk to him?

A. Sheriff Tyson, I believe, did most of the talking. I don't know whether the Sheriff or I told him we had Lloyd Ray. Sheriff told him he didn't have to make a statement, that anything he said would be used against him.

Q. Anybody strike or slap him or any effort made to intimidate him by force?

A. No, sir.

Q. Anything done to him?

A. No, sir.

Q. Did he tell you his part in the matter?

A. He said he was with Lloyd Ray on Saturday night and they got the taxicab to carry them out the Washington highway and that he was with Lloyd Ray when they killed the taxi driver or robbed the taxi driver. We changed cars and I started driving at the police station. I drove my patrol car.

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Q. Were you present when Sheriff Tyson talked to both of them?

A. Yes, I was.

Q. Bennie said you and others went upstairs in the jail and that you struck him or knocked him down, knocked him sideways?

A. Best I recall I didn't go to the jail at all when we went back the last time.

Q. Did you at any time while you were down there that night, whether upstairs or down, strike him?

A. No.

Q. Did you threaten him in any way or hold out hope to him that he ought to make a statement, that it might be lighter, or coerce him in any way?

A. No, sir.

Q. Was anything done like that by you or anybody present?

A. No, sir.

Q. What was his attitude about talking about it?

A. Lloyd Ray was brought downstairs first and statement taken from him and then Bennie and then we talked to them together after they made statements.

Q. Were the statements read to them?

A. Yes, sir, Mr. Page read the statements to them after they were typed up.

Q. Anything said about signing it?

A. They were told again they didn't have to sign the statements if they didn't want to.



- Q. Who told them that?
- A. Mr. Page and Sheriff Tyson too, I believe, the best I recall.
- Q. Lloyd Ray says when you were down there that night at Williamston that he asked you or told you he wanted to see his mother. State what you know about that?
- A. He never at any time asked to see his mother or people and neither did Bennie.
- Q. Did they ask for an attorney?
- A. No, sir.
- Q. In his statement he said you said if he didn't talk he would never see his mother again. Did you say anything like that?
- A. No, sir.
- Q. Did they make any statement about how they had been treated?
- A. They said we had been very nice to them. They were asked the question if anybody had mistreated them or offered to hurt them and they said we had been very nice to them.

L. E. MANNING (Federal Transcript) TESTIFIED AS FOLLOWS:

#### DIRECT EXAMINATION

- Q. Where do you live?
- A. Greenville.
- Q. What position do you hold?
- A. Deputy Sheriff.
- Q. Did you hold that position at the time of the trial and before the trial at the time of the arrest of Lloyd and Bennie?
- A. Yes, sir.
- Q. Do you remember when the boys were arrested?
- A. I remember when Lloyd Ray was arrested.
- Q. Who was along with you at that time?
- A. Sheriff Tyson, Mr. Gibbs, Captain Dorsey, Mr. Corbett and Deputy Sheriff Mills.

- Q. Will you tell what happened at the time he was arrested?
- A. As has been stated here before, we left the car at Mr. L. C. Whitehurst's house. This tenant house is on Mr. Whitehurst's farm. We walked down a path from where we left the car to this tenant house. Sheriff Tyson, Captain Dorsey and myself went in the house. First knocked the door. They wanted to know who it was. Sheriff Tyson told them. They opened the door and we walked in. There was a couple of other boys on a bed and Lloyd Ray was on a different bed. He was laying with his head covered up, completely covered up. Captain Dorsey took the quilt on the bed and pulled it back, saw him laying there, told him to get up. Asked him his name. He didn't tell us to start with but he later did tell us.
- Q. Was he dressed at the time?
- A. Fully dressed except his hat. Had on his clothes, coat, shoes and all except his hat.
- Q. Did you go to Williamston with other officers?
- A. Yes, sir.

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- Q. Did they make any statement about how any statement he might make would be used?
- A. Yes, sir.
- Q. What statement did they make? What did Sheriff Tyson say?
- A. He told him he didn't have to make any statement, that he could make one if he wanted to or he didn't have to make one. That nobody was going to hurt him if he did or didn't. Lloyd Ray denied it until we told him we had those clothes.

THE COURT: You had the clothes before you went there?

A. Yes, sir.

Q. Have them with you?

A. No, sir.

Q. You heard Lloyd Ray make his statement?

A. Yes, sir.

Q. Did anybody use force to get that statement?

A. No, sir.

Q. Hold out any reward for him if he would make it?

A. No, sir.

Q. Make any threats?

A. No, sir.

Q. Use any inducement?

A. No, sir.

Q. Use any force against him?

A. No, sir.

Q. Tell him he would never see his mother again?

A. No, sir.

Q. Offer him any bodily harm?

A. No, sir.

Q. Put their hands on a pistol?

A. No, sir.

Q. You didn't do any of those things?

A. No, sir.

Q. You were at Williamston, were you not, at the time the statements were made there?

A. Yes, sir, I was.

Q. You went upstairs, didn't you, after the defendants?

A. Yes, sir.

Q. Who was with you?

A. Mr. Peel and myself went upstairs and got Lloyd Ray and brought him down. We talked to him. Then we went back and got Bennie and brought him down.

Q. While upstairs did you linger up there or bring him on down?

A. No, sir, all the staying up there, Mr. Peel unlocked the door, called each one, the one we were after.

Q. Any of you strike either one up there?

A. No talk going on up there between us to the prisoners.

Q. Did Mr. Page go up there?

A. No, sir, no one but me and Mr. Peel.

Q. Did you strike any of the boys up there?

A. No, sir.

Q. Did Mr. Peel strike any of them?

A. No, sir.

Q. Either of you offer any threats to them?

A. No, sir.

Q. Any violence?

A. No, sir.

Q. Any coercion?

A. No, sir.

Q. Hold out any reward?

A. No, sir.

Q. Tell them they would never see their mother again?

A. No, sir.

Q. Any of them tell you that they wanted to see their mother?

A. No, sir.

Q. Ask you to see anyone else?

A. No, sir.

Q. Ask for an attorney?

A. No, sir.

Q. Were you downstairs when the second statement was made?

A. I won't in there all the time at the time the statement was being made. I was in there when the statement was read to them and Bennie signed it and Lloyd Ray made his mark.

THE COURT: Who read it?

A. Mr. Page.

Q. Did anyone ask them if that was their statement?

A. Yes, sir.

Q. What was the answer?

A. Said it was.

Q. Any one make threats to them?

A. No, sir.

Q. Anyone coerce them?

A. No, sir.

Q. Any one use violence against them?

A. No, sir.



CAPTAIN S. B. DORSEY (Federal Transcript) TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

Q. State your name and address?

A. S. B. Dorsey, Greenville.

Q. At the time Benjamin O'Neal was killed what position did you hold in Greenville?

A. With the police department.

Q. Prior to that had you served in a position with the state department?

A. Yes, sir, about thirteen years. I was director of bureau of investigation.

Q. Were you present when either one of the petitioners, Lloyd Ray Daniels or Bennie Daniels was arrested?

A. Yes, sir, when both were arrested I was present.

Q. I don't believe you went to Williamston on any trips?

A. I was present when we carried Bennie down there.

Q. Were you on the automobile?

A. Yes, sir.

Q. Hear any statements he made?

A. Yes, sir. I didn't make any notes on it. He made the statement that Lloyd Ray done the most of the murdering of Benjamin O'Neal.

Q. Did anybody offer any inducement to him, or threaten him, or slap him, or tell him it would be better to make a statement?

A. No, sir, no threat.

Q. Anything done to him?

A. No, sir.

Q. Any weapon drawn on him?

A. No, sir.

Q. Did Sheriff Tyson, or you, or anybody make any statement to him that he had to make a statement?

A. No, sir, didn't make any threats. Told him he didn't have to make a statement.

Q. Were you present later on when a statement was made in Williamston?

A. No, sir.

Q. Were you down there when a written statement was made?

A. No, sir.

Q. On this occasion when you was in the car with Bennie was that the only time you was with any of them when a statement was made?

A. No, sir. I was with both when they were brought back from the asylum and from the State Prison too.

Q. Who was with you when they were brought back from Raleigh?

A. Me and Mr. Tyson and Mr. Manning.

Q. Did they make statements on that occasion?

A. Yes, sir, we were right beyond Finch's Mill coming from Raleigh to Wilson. We stopped on a curve above Lamb's School. Mr. Tyson took the bloody clothes and spread them on the hood of the car and told them to point out their clothes and they pointed them out and we laid them on separate piles.

Q. Did they make statement about who killed O'Neal?

A. Yes, sir. Bennie said he hit Mr. O'Neal with a brick and a plank and tobacco sticks but he didn't cut him.

Q. Did Lloyd Ray have anything to say about it?

A. Yes, sir, said he hit him with a plank and brick but said he didn't cut him.

Q. Did anybody threaten them or slap them or tell them they had to make a statement?

A. Yes, sir, we were as close to the highway as from me to you.

Q. Anybody tell them it would be better to make a statement, would be lighter on them?

A. No, sir.

Q. You were not present in Williamston?

A. No, sir. The night we put Bennie in jail in Williamston I was there. I pulled off his top shirt and his under-shirt was dirty and he had a box of cundrums in his pocket.

Q. You helped search him?

A. Yes, sir.

Q. Any signs or cuts on him?

A. Yes, sir, I believe on his hands.

Q. Where was that?

A. I think on his hands.

Q. It was not under his undershirt?

A. No, sir.

Q. Did you attempt to make fingerprints?

A. Yes, sir, I tried all on the inside and outside of the car but prints were smeared so I couldn't get them.

Q. Could you develop any?

A. No, sir.

Q. Did you try on the tobacco sticks and bricks and things like that?

A. Yes, sir.

Q. You helped bring them back from Goldsboro?

A. Yes, sir.

Q. Was anything said then?

A. Yes, sir, right at Ormondsville, just me and Mr. Manning and Bennie and Lloyd Ray. Mr. Manning asked them were they still sorry they killed Mr. O'Neal and Bennie said, "Yes, I been praying at the prison about it. A man been praying with us at prison about it". I said, "Who is that man?" He said he didn't know. I said, "Was it Chaplain Jackson?", and he said "Yes, that's the man." But Lloyd Ray said he didn't know anything about it. I said, "Somebody been talking to you?", and he said, "Yes".

THE COURT: You mean about the crime?

A. Yes, sir.

OSCAR ARNOLD (Federal Transcript) TESTIFIED AS FOLLOWS:

#### DIRECT EXAMINATION

Q. Please state your name?

A. Oscar Arnold.

Q. Where do you live?

A. Greenville.

Q. Living there in 1949?

A. Yes, sir.

Q. What was your employment then?

A. At that time stenographer, clerk and assistant desk sergeant for the city police department.

Q. Are you so employed at this time?

A. Yes, sir.

Q. Is it in testimony that you went to Williamston on Tuesday night following this alleged homicide?

A. That's correct.

Q. You know anything about any confessions or statements having been made before that time?

A. No, sir, I don't.

Q. Were you at Williamston when Lloyd Ray and Bennie Daniels made the statements that have been testified about here?

A. Yes, sir.

Q. Tell us what you did with respect to their statements?

A. They just told me what they did on the night, I believe February 5th.

Q. Did each one tell you himself, by himself?

A. Yes, sir, told me what they did on the night of February 5th as best they could remember it. I took it down in shorthand and typed it out on the paper so frequently used here.

Q. In Williamston?

A. Yes, sir, in the Sheriff's office.

Q. Will you state whether the statements after you had transcribed them were read to them?

A. Yes, sir, Lloyd Ray's was read twice and Bennie's was read once.

Q. What did they say?

A. That that was the best they could remember what they did.

THE COURT: Why was Lloyd Ray's read to him twice?



A. First Page read it right after I finished it and then took it back there after I finished writing Bennie's and Lloyd Ray's and Bennie's were read to them.

Q. State whether or not anybody hit them or threatened them or offered any violence?

A. No, sir.

Q. State whether anybody there offered them any inducement or reward or promise of reward?

THE COURT: They don't contend anybody offered them anything. They contend they were frightened, struck by one of the officers and threatened to be killed unless they made statement as the officers wanted it.

Q. You started about whether any threats were made?

A. There were no threats made.

Q. What was their attitude with respect to making the statements?

A. They were talking as freely as you are asking questions.

Q. State whether or not they made the statements immediately upon being brought down?

A. Made them immediately after being told they didn't have to make them if they didn't want to and if they did make them they could be used in court or anywhere else against them.

Q. Did you identify the statements in the trial in the Superior Court?

A. Yes, sir.

Q. I ask you if these are the statements you transcribed?

A. They are.

Q. How about this one?

A. That one too.

Q. Were they signed in your presence?

A. Yes.

Q. Did Bennie Daniels sign that himself?

A. Yes, with my pen because it was a ball pen and didn't care how much he bared down on it. Lloyd Ray said he couldn't sign his name and Chief Page signed it and Lloyd Ray made his mark.

L. E. MANNING (Federal Transcript) TESTIFIED AS FOLLOWS:

RE-DIRECT EXAMINATION

Q. Mr. Manning, it has been stated, I don't know whether by you or not, that you or one of the officers took these petitioners to the Central Prison. State whether or not they made any statements between themselves or among themselves on the way to Central Prison about the alleged homicide?

A. They said they were sorry they did it and wouldn't have done it if they hadn't been drinking, that drinking was the cause of them doing it.

Q. Was that a conversation they had among themselves?

A. One of them was talking to the other one and talking about they had themselves in a mess and said they wouldn't have done it if they hadn't been drinking.

SHERIFF R. W. TYSON (Federal Transcript) TESTIFIED AS FOLLOWS:

RE-DIRECT EXAMINATION

Q. When you arrested Lloyd Ray Daniels who was present?

A. Deputy Sheriff Mills, Deputy Sheriff Manning, Mr. Dorsey, Mr. Gibbs and officer Corbett.

Q. What Manning?

A. L. E.

Q. Which of those got in the car and went to Williamston with you?

A. Gibbs, L. E. Manning and I.

Q. What became of Mr. Corbett and Mr. Mills?

A. Went back to Greenville.

Q. Were they ever present when any of the statements were made by the petitioners?

A. No, sir.

Q. Were they there Tuesday night when written confessions were supposed to be signed?

- A. No, sir.
- Q. Who was present when the written confessions were signed?
- A. L. E. Manning, Chief Page, S. G. Gibbs, Oscar Arnold, Roy Peel, myself, and Sheriff Roebuck, who is dead.
- Q. Was Claude Manning present?
- A. No, sir, he was with them when they got the clothes from Lloyd Ray's home.
- Q. Was Ray Smith present?
- A. Ray Smith was present when Bennie was arrested and when we went to Williamston.
- Q. He has testified?
- A. Yes.

SHERIFF RUEL W. TYSON (State Transcript) TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

- Q. You say you and Manning and Gibbs took him on the car?
- A. Took him on the car to Williamston. On the car I told Lloyd Ray any statement he made would be used against him in court. I began to talk to him.

DEFENDANTS OBJECT to any voluntary statement.

- Q. BY THE COURT: Did you make any threat to him, or threaten him in any way to obtain any statement from him?
- A. No, sir, there was no threat made.
- Q. BY THE COURT: Did you offer any coercion?
- A. No.
- Q. BY THE COURT: Or force of any kind?
- A. No.
- Q. BY THE COURT: Any reward?
- A. No.
- Q. BY THE COURT: Any inducement?
- A. No.

Q. BY THE COURT: Was the statement made by him made voluntarily on his part?

A. It was.

DEFENDANTS WOULD like to offer rebuttal evidence in the absence of the jury.

To the competency of the evidence sought to be elicited of Sheriff Tyson the defendants object, contending that any statement made by either of the defendants was not freely and voluntarily made. Whereupon the Court in the absence of the jury heard testimony bearing upon the circumstances surrounding the making of the statement as follows:

BY THE COURT: I will let him state what was said and what was said between them relative to the statement.

#### RE-DIRECT EXAMINATION

By Mr. Bundy:

Q. Is there anything other than what you have said was said between you and him before he made the statement, if so relate that.

A. I warned him that any statement he made would be used against him in court.

Q. BY THE COURT: Did anybody say to him that it would be better for him to tell the truth? Was anything like that said to him?

A. No, sir.

Q. Was anything said to him by you or any of the others that it would be lighter on him?

A. No.

Q. Did you hold out any hope of reward or lightening of punishment or anything of that kind?

A. No.

Q. Did you offer him any inducement to make the statement?

A. No.



- Q. You said you didn't make any threats or no threats were made?
- A. No threats were made.
- Q. Did you attempt to make any?
- A. No.
- Q. Did any of you attempt to do him any physical harm?
- A. We did not.

### CROSS-EXAMINATION

- Q. BY THE COURT: Were you present when he dictated the statement to the stenographer?
- A. Yes, sir, I was present all the time.
- Q. Did you hear what he said?
- A. Yes, sir.
- Q. Have you read that statement?
- A. Yes, sir.
- Q. Does that correspond with what he said to the stenographer?
- A. It does.
- Q. Was any threats made to him at that time, or coercion or threat by you?
- A. No, and if you will allow me to make this statement. After statements were all made and read to Lloyd Ray and Bennie—
- Q. Was Bennie there?
- A. Yes, he made a statement and signed it.
- Q. Were they all made in each other's presence?
- A. Yes, made in each other's presence; one heard what the other said. After these statements were made, read and signed I talked to Bennie and Lloyd Ray in the presence of these other officers and asked them if anybody had offered them anything, or threatened them, if anybody hit them or offered to do them any harm or anybody cursed them and they both spoke up and said "Nobody hit us, cursed us or mistreated us in any way and every one of you have been as nice to us as

you could be. That was in Sheriff Roebuck's office in Williamston.

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- Q. Who was with you when he was arrested?
- A. Mr. Dorsey, Mr. Gibbs and Ray Smith, a fireman.
- Q. Did you tell him what you were arresting him for?
- A. Yes, sir, told him we were arresting charging him with murder of William Benjamin O'Neal. After I told him what he was arrested for I warned him that any statement he made would be used against him in court when he was tried.
- Q. Did you tell him it would be better for him to tell the truth?
- A. I did not.
- Q. Did you say anything to him about any reward or offer any inducement for him to make a statement?
- A. I did not.
- Q. Did you exhibit any force or coercion in any way?
- A. I did not.
- Q. Was the statement made by Bennie made freely and voluntarily on his part?
- A. It was.
- Q. Was that later reduced to writing?
- A. That was later reduced to writing at the same time Lloyd Ray was in Sheriff Roebuck's office.
- Q. After you arrested Bennie where did you talk to him?
- A. At Williamston.
- Q. Did you put them in the same cell?
- A. They were in the Martin County jail, whether they were in the same cell I don't know.
- Q. Did any member of the officers present when Bennie was arrested make any offer or inducement to him to make a statement?
- A. They did not.
- Q. Or threaten or coerce him in any manner?
- A. Did not.

BENNIE DANIELS (State Transcript) TESTIFIED AS  
FOLLOWS:

DIRECT EXAMINATION

Q. BY THE COURT: Which one slapped you?

A. I don't know that; I know them when I see them but I don't know their name.

Q. Do you see the officers here that were there that night?

A. I see some of them. This man that was up here a while ago was.

Q. Is he the one that slapped you? Sheriff Tyson?

A. No, sir.

Q. Who else was there?

A. Mr. Gibbs.

Q. Did he slap you?

A. No, sir.

Q. Who else was there?

A. Mr. Manning.

Q. Did Mr. Manning slap you?

A. No, sir.

Q. Who else was there?

A. Some of the other laws from Williamston.

Q. You don't see them in the court room?

A. No, sir, and there were some more men up there.

Q. BY THE COURT: Which one of the officers was it here that slapped you? Was Chief Page there?

A. I don't know him.

Q. Did you say one of these officers slapped you or some other officer slapped you?

A. Some other officer slapped me.

Q. You don't know whether it was one of the Williamston or Greenville officers?

A. One of the officers; I don't know who he was.

Q. BY THE COURT: Were all the officers in there talking at the same time?

A. No, sir.

Q. BY THE COURT: Who was in there when you say they slapped you?

A. That fellow sitting yonder.

Q. BY THE COURT: Mr. Gibbs?

A. Yes, sir, and that man sitting yonder.

Q. BY THE COURT: Chief Page?

A. Yes, sir.

Q. BY THE COURT: Was he the one that slapped you?

A. No, sir.

Q. BY THE COURT: They were in there when you were slapped?

S. G. GIBBS (State Transcript) TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

Q. You just heard Lloyd Ray say what happened that night. He said you had your hand on your pistol and said you were going to kill him if he didn't tell the truth he would never see his mother again, etc. What of that, if anything?

A. None of that he stated happened.

Q. What did happen?

A. We arrested Lloyd Ray at the house on L. O. Whitehurst's farm near Stokes. We took him back to the car, half or three-quarters of a mile of the place he was arrested. Sheriff Tyson, Mr. Manning and myself took him in the car and started to Williamston. I don't think we had him in the car over ten minutes. We questioned him about the crime and he said he might as well tell us the truth, and made the statement.

Q. Did you offer any force or violence toward him?

A. No, sir.

Q. Did you put him under any fear?

A. No, sir.

Q. Did you say anything to him to scare him?

A. No, sir.

Q. Did you offer him any reward?

A. No, sir.



Q. Did you hold out any hope of reward?

A. No, sir.

Q. Did you offer him any inducement?

A. No, sir.

Q. Did you curse him or use any profanity?

A. No, sir.

Q. Did you curse him?

A. No, sir.

Q. Did you get your gun out?

A. No, sir.

Q. Did you have your hand on your gun and tell him he would never see his mother again?

A. No, sir.

Q. Did you tell him you were going to kill him?

A. No, sir.

Q. Did any of you use force or attempt to use force, offer him any reward, hope or reward or offer any inducement or any of you tell him it would be better and would go lighter on him?

A. No, sir.

Q. Did you warn him if he made any statement it would be used against him?

A. Sheriff Tyson warned him that anything he said would be used against him. In questioning him about this matter Lloyd Ray said he might as well go ahead and tell us the truth about it.

Q. Did he tell you about it then?

A. Yes, sir, he did.

Q. Did you reduce it to writing? In general did you write what he said?

A. Yes, sir.

Q. Did you get that signed by him afterwards?

A. He said he couldn't sign his name; he made his mark on the bottom of the second page; that was before we got to Williamston.

Q. Did you write that as you were riding along?

A. Yes, sir, under a flashlight on my note book in my handwriting.

- Q. Were you present in Williamston when he and Bennie made that statement?
- A. Yes, sir, I was.
- Q. Did you slap either one of them?
- A. No, sir.
- Q. Did you curse either one of them?
- A. No, sir.
- Q. You are now connected with the S.B.I.?
- A. Yes, sir.
- Q. Did anybody there at Williamston offer any violence toward either one of these defendants?
- A. No, sir, did not.

DEFENDANTS OBJECT, OVERRULED.

- Q. Was anything done there toward inducing them to make a statement, any offer of reward or hope of reward, or any statement made to him by anybody that it would be better for him?
- A. No, sir.
- Q. Was each of their statements freely and voluntarily made?
- A. It was.
- Q. Was a man there that was crippled in the leg?
- A. Not an officer there; the stenographer who took it down is crippled. Oscar Arnold.
- Q. Is he up here?
- A. He is not up here this morning. He does clerical work at the police station.
- Q. Did he offer to hold out a reward or hope of reward or inducement?
- A. No.
- Q. Did he take it down in shorthand as they told it?
- A. Yes, sir, then he transcribed it on a typewriter.
- Q. Was it read back to them?
- A. Yes, sir.
- Q. Did they sign it?
- A. Lloyd Ray made his mark; he said he couldn't sign his name. Bennie signed his.

- Q. Did you see Bennie when he signed it?  
A. Yes, sir.  
Q. Did you witness it?  
A. Yes, sir.  
Q. Is that the signature he made at that time in your presence?  
A. It is.  
Q. Did you see this boy make his mark?  
A. Yes, sir.

## CROSS-EXAMINATION

- Q. You questioned him where?  
A. In the Sheriff's office in Martin County.  
Q. Who was there?  
A. Sheriff Roebuck, Sheriff Tyson, Chief Page, Mr. Arnold, Capt. Dorsey and myself.  
Q. BY THE COURT: Were you there all the time?  
A. Yes.  
Q. Did you slap him?  
A. No, sir.  
Q. Did anybody slap him?  
A. No, sir.  
Q. Threaten him?  
A. No, sir.  
Q. Coerce him?  
A. No, sir.  
Q. Who signed Lloyd Ray's name?  
A. I believe Mr. Page did and he made his mark and we witnessed his making his mark. He said he couldn't sign it.  
Q. When you got this alleged statement that Bennie was supposed to have signed were you there?  
A. Yes, sir.  
Q. Was Bennie in there at the time it was signed?  
A. Yes, Bennie signed it himself, his statement.  
Q. When did you read it to him?  
A. I believe Mr. Page read it to him before he signed.

Q. To each one of them?

A. Yes, sir.

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L. E. MANNING (State Transcript) TESTIFIED AS FOLLOWS:

CROSS-EXAMINATION

Q. Will you tell us who slapped these prisoners?

A. I sure couldn't; nobody.

Q. You know he was hit?

A. No, he was not. I know he wasn't hit.

Q. You were there weren't you?

A. Yes, I sure was. He was not hit by anybody after he was arrested up to now when he was in our custody.

Q. You just talked to him and scared him to death?

A. We talked to him; I don't think we scared him to death.

Q. He was handcuffed?

A. Yes.

Q. You had your pistol?

A. Yes.

Q. Your black-jack?

A. No, I don't even carry a black-jack; I wouldn't know what to do with it.

Q. At the time you got this statement and this one here, alleged confessions do you know whether or not these boys had had any contact with their people?

A. I do not know; so far as I know they hadn't.

Q. Or whether they had consulted any lawyer?

A. Not to my knowledge.

Q. BY THE COURT: Did they make any request in your presence at any time to see any attorney or anybody else?

A. No.

Q. You say you did warn them of their rights?

A. The Sheriff did.

Q. Advised them of their rights?

A. That is correct.



Q. Do you think they understood what the Sheriff meant by what he said to them?

A. I think so.

Q. Can you repeat what the Sheriff said to them?

A. I believe his words were "You know that anything you say later can be used against you." I couldn't put it in his exact words.

Q. You wouldn't deny that it was something else besides what you said?

A. I know they were warned in words to that effect whether it was the exact words I stated.

Q. You would look at him and tell he was scared to death?

A. I don't think Lloyd Ray was scared. He looked just as calm as he does now.

Q. He didn't talk that way?

A. He talked alright.

Q. You heard Mr. Gibbs threaten him in the car?

A. No, sir.

Q. Didn't you hear him tell him he had better admit this murder if he wanted to see his mother again?

A. No, sir, I did not.

Q. You got out of your car a little while?

A. I got out when it stopped with car trouble.

Q. Did you know Mr. Gibbs had this alleged confession?

A. Yes.

Q. Did he show it to you?

A. He showed it to me after we got to Williamston. I heard Lloyd Ray; of course he was talking to all of us and Mr. Gibbs had his flashlight and was writing in the back seat as we were driving along and didn't stop anywhere until we had trouble with the car. That was the night he was arrested.

Q. Did you tell Sheriff Tyson that Mr. Gibbs had this confession?

A. Yes.

Q. So the Sheriff knew it at the time?

A. I didn't tell him that right there as I know of but he knew the next morning we had it.

- Q. He knew it before you got that last one?
- A. He knew he had a kind of detailed notes of it. He went back up there and they both were talking to Bennie and Lloyd Ray and each one made the statement; then, we got them together and they both made it in the presence of each other, then is when we wrote this last one out and Bennie signed it and Lloyd said he couldn't write.
- Q. Nothing was said to them only the fact they went ahead and made this settlement?
- A. We asked them about it; we didn't make no threats on them at all.

CHIEF L. D. PAGE (State Transcript) TESTIFIED AS FOLLOWS:

CROSS-EXAMINATION

- Q. You are Chief of the Police force?
- A. Yes, sir.
- Q. Who was it hit Bennie Daniels that night over there?
- A. He was not hit.
- Q. How many officers were there at the time?
- A. There were several.
- Q. Standing all around asking him questions?
- A. No, the Sheriff and I did most of the questioning?
- Q. He was handcuffed?
- A. No.
- Q. Did you hear the testimony a while ago?
- Q. BY THE COURT: You are talking about the questions asked him in Williamston?
- A. Yes, sir.
- Q. He was in the Sheriff's office over there?
- A. Yes.
- Q. How long was Bennie in the Sheriff's office at that particular time?
- A. Possibly an hour or an hour and a half, I don't remember. Lloyd Ray was there too, both in the office at the same time.

Q. The same room?

A. There were two rooms, one I believe they call the State Highway Patrol but the door was open between them.

Q. But you had them in separate rooms?

A. Yes, to start with.

Q. What do you mean?

A. When we read the confessions to them we got them together and let them make a statement in the presence of each other, then we read the statements to them and asked if that was correct and they said it was and we let them sign it.

Q. You questioned them in separate rooms?

A. There is a door between but it was open.

Q. There was a door between. How long did you question them?

A. We really didn't have to question them; they voluntarily told us as soon as we asked them about it, said they wanted to make a statement.

Q. You were there how long?

A. An hour and a half, or something like that. Lloyd Ray was about like he was on the stand here; he would rattle off and you would have to stop him long enough for the stenographer to get it.

Q. Who signed his name?

A. I signed his name and he put his mark.

Q. That's your writing down there?

A. The name is his; the mark is his; he made the cross mark.

Q. But he made it when you told him?

A. Yes, I told him.

Q. That's your handwriting there?

A. Yes, but the mark there is his.

Q. Which you told him to put on there?

A. I told him to put the mark there, yes, asked him to.

Q. Do you know who wrote Bennie's name to his alleged confession?

A. Bennie himself.

- Q. Who made him do it?
- A. Nobody.
- Q. Who told him to do it?
- A. I asked him. I read it to him and asked him if that was correct and he said it was and I asked him to sign it and he said it was.
- Q. The notes were taken down by a stenographer?
- A. Yes.
- Q. You are not attempting to testify as to the accuracy?
- A. No more than from memory.
- Q. You are not swearing it was exactly right?
- A. I read it to him and he—
- Q. I asked you this: You are not attempting to swear to the exactness or accuracy of the transcript?
- A. I'm not swearing to the shorthand marks because I don't know.
- Q. Was the stenographer who took the notes down lame in any way?
- A. Yes, I think he has had infantile paralysis and is crippled in both legs I think.
- Q. BY THE COURT: Were those statements made freely and voluntarily by both defendants?
- A. Yes, sir.
- Q. BY THE COURT: Any inducement or reward or hope of reward?
- A. No, sir.
- Q. BY THE COURT: Any coercion or violence demonstrated?
- A. No, sir.
- Q. BY THE COURT: Were either of them hit or slapped?
- A. No, sir.

OSCAR ARNOLD (State Transcript) TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

- Q. Are you employed at the City Police office here?
- A. Yes, sir, as clerk.



Q. Were you at Williamston the night the statements were made?

A. Yes, sir.

Q. Did you take them down in shorthand?

A. Yes, sir.

Q. As they told it?

A. Yes, sir.

Q. Then what did you do?

A. Typed it out.

Q. Took down what the defendants said, each word as he said it, using the identical words?

A. Yes, sir.

#### DEFENDANTS OBJECT.

A. I typed them and it was read back to him as he said it by Chief Page and they were asked was it right and they said "Yes" and they were asked to sign them and did. Lloyd Ray said he couldn't.

Q. BY THE COURT: In writing did you add to or detract from any word they used in making the statement?

A. I did not.

Q. BY THE COURT: Was it transcribed exactly as made?

A. It was.

Q. BY THE COURT: Did anybody use coercion?

A. No, sir.

Q. Did anybody hold out any reward or hope of reward or offer any inducement?

A. No.

Q. Was the statement freely and voluntarily made?

A. They came out and made them after they were asked what they did that night.

Q. Did you take the statements down as they were given?

A. Yes, sir.

Q. Did anybody slap him?

A. Nobody slapped him.

RAY SMITH (State Transcript) TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

Q. Were you present when Bennie was arrested?

A. Yes.

Q. Did you go to Williamston?

A. Yes.

Q. Did he make a statement in the car?

A. Yes.

Q. Was it made freely and voluntarily?

A. Yes, sir.

Q. Was any violence or attempt of violence?

A. No.

Q. Were they put in fear or coerced?

A. No.

Q. Was there any offer of reward or hope of reward or any inducement held out to him?

A. No, sir.

Q. Did anybody slap him?

A. I didn't see anybody slap him.

L. E. MANNING (State Transcript) TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

Q. You took Lloyd Ray downstairs from upstairs with the jailer?

A. Yes.

Q. Was Bennie in there then?

A. No. We taken Lloyd Ray down and talked with him, and after we got through talking with him we went back and got Bennie, brought him down, talked to him separate and then got them together and they made the same statement.

Q. How long was Lloyd Ray in there before he made the statement?

A. He started making the statement as soon as we went in there.

Q. After he made his Bennie was brought in and questioned and he made his?

A. That's right.

Q. How long was Bennie in before he made his statement?

A. As soon as they started asking questions he started answering them right off, wasn't any length of time. Mr. Arnold taken them in shorthand as they were said and then we went to the typewriter.

Q. About how long were you in their altogether?

A. I don't know; I don't think it was more than an hour or an hour and a half.

Q. You mean from the time you first went in with Lloyd Ray until it was over?

A. That's right.

Q. Did you write his name?

A. No, sir.

Q. Did you make his mark?

A. No, sir.

#### RE-DIRECT EXAMINATION

#### THE COURT:

Upon the voir dire conducted by the Court for the purpose of determining the admissibility of certain statements alleged to have been made by each of the defendants to the officers subsequent to arrest, the Court finds as a fact that the statements of each of the defendants, Bennie Daniels and Lloyd Ray Daniels, referred to by the witnesses, were made freely and voluntarily, not induced by offer of reward or hope of reward, nor extorted by either coercion, intimidation or exhibition of any force, and that each of the statements of each of the defendants was freely and voluntarily made by him.

TO THE FOREGOING RULING THE DEFENDANTS AND EACH EXCEPT.

## STATE'S EXHIBIT 8.

C. B. ROEBUCK  
SHERIFF OF MARTIN COUNTY  
WILLIAMSTON, N. C.

I, Laura Ray Daniels, of my own free will and accord without promise of reward or of threat of bodily harm and after being told that this statement could be used in court against me, make the following statement.

I took some liquor with some boys in Greenville and Benny and myself got together at the Bus Station where we planned to get a cab to carry us out home, and we planned to rob the cab driver. We went out the Washington highway to where we turned left on the Alvin Hill road and I told him to drive down to those two tobacco barns. Benny said get his money after we had stopped at the tobacco barn and he threw his knife around his throat. Then, he handed me his belt and told me to tie him, he said he might have a pistol. I took Benny's belt and tied his hands. Then I took my belt also and looped it around his arms. Then I reached in his pocket with my left hand and got his billfold and searched it. There was nothing in the billfold, so I throwed it down in the foot of the car. Then I reached my hand (left hand) in his coat pocket and got his money. There was about three or four .50's and one bill. I handed it back over the seat to Benny. We told the driver to get out of car and I slid out of the car under the steering wheel the same way the driver got out. When I got out on the ground the driver William O'Neal hit me and had a knife in hand. I grabbed his hand and we went down to the ground. The belts must have come loose when we got out on the ground. We began rolling and Benny was standing over us. We rolled to and into the tobacco barn. We had planned to kill the driver William O'Neal before we got the taxi to carry us home. We were in the tobacco barn. I was cutting something, it might have been the ground with O'Neal's knife which I had taken away from him. While we were in the tobacco barn. I could not tell



where Benny was cutting him or not. It was so dark that I could not see what I was cutting and we were laying side by side. We fell up against the door and rolled back out of the barn. We beat him with some tobacco sticks and beat him down on the ground. Benny told me to keep him down until he got back and he went around the barn and come back with two bricks and a tobacco cart slide. Benny gave me the truck raleing and he hit him with one of the bricks. When Benny hit him with the brick, I kicked the other brick out of his hands. Then I hit him with a cart side over the head. We seen that he were dead then. While we were in the car and Benny had his knife around his throat, he told us not to kill him, he said you boys are just children and we told him to get out. After we killed him, we left and went home to mama's house, and pulled off our clothes and went to bed. We got up the next morning about 7:00 o'clock and caught a bus and went back to Greenville. We went to where my sister were staying. My sister and Lonzo Hardy came in and I told my sister to go tell my mother to destroy those clothes that we wore the night before. I had told my mother that we were in a fight before in Greenville, and that I had got cut and got blood on my clothes. Me and Benny left and went down the railroad and I stopped and told Benny that I was going back and was not going to run. Benny told me I was a fool to go back, that I would get caught. I told him that I would get caught anyway. I just as well get caught now. I went back to my sister's and told her I was going across the river to me girl friend's house. Benny said he was going to stay in the woods until it got dark. I went across the river to my girl friend's home and lay down across the bed and that is where the officers found me.

(2nd page)

The fore-going statement was made and signed by me this, the 8th day of February 1949 in the Sheriff's office

in Martin County, before the following officers, whom I know to be officers of law.

Witnesses:

Ruel W. Tyson

Lester D. Page

S. G. Gibbs, S. H. P.

L. E. Manning

(Signed) Laura Ray x Daniels  
his  
mark

### STATE'S EXHIBIT 9

C. B. ROEBUCK  
SHERIFF OF MARTIN COUNTY  
WILLIAMSTON N. C.

I, Bennie Daniels, of my own free will and accord, without promise of reward or of threat of bodily harm and after being told that this statement could be used in court against me, make the following statement.

Me and Laura Ray were in Bonner's Lane in Greenville about 8:30 o'clock Saturday night. Then, I told him to let's go home after the boys started fighting him and he said O. K. Then, we went on around to the bus station and the bus had not come so he said let's catch a cab. I told him I did not have enough money to help him pay it, and he said he was going to pay for it. We went and asked the cab driver to take us home "William O'Neal" the one we killed. Then, after he told him where we were going, we went on down there and turned to the left on a dirt road toward the river. He told the driver to turn up in the barns because he could not turn around on down the road. He put his knife around the man's neck and the man put up his hands, and I took our belt and tied his hands. Then, we went on in the barn, while we were in the car, Laura Ray asked him where his money was, and he said he didn't have but a dollar and a half, because he just started to work this afternoon. After we got in the barn we had a fight Laura Ray cut him while he was in the barn. We drug him out of the barn and layed him down on the ground. We both got some sticks from under the shelter

and beat him. Then, Laura Ray went and got 2 bricks and I beat him with the railing one lick. I threw it down and Laura Ray picked it up and he also struck the man one time with the railing. Then, we left and walked to Laura Ray's home. Me and Laura Ray's changed clothes and then me, Laura Ray, and Laura Ray's sister and his other sister's boy went back to the store and got some drinks. We left the store and went back home and went to bed. We left the next day about 11:30 or 12:00 o'clock and caught the bus to Greenville. We went aound to my cousins then we left there and went to where his sister lives. While we were there his other sister and two men came in and we all went up stairs. Hardy called me down the stairs, then Hardy told me about the man getting killed. After Hardy told me, I called Laura Ray down stairs and told him. We left there and went down the railroad. We turned off the railroad and went in the woods. We stayed out there about 30 minutes and Laura Ray left me in the woods. I stayed in the woods until night and Laura Ray left. When night come, I left the woods and went back to my cousins, (Gertrude Pratts'). I stayed there that night and until about 12:00 o'clock the next day. I left there and went out and caught a ride to Bell Forks. Then I stayed at some boys houses until about 1:00 o'clock. Then I went from home down to Moore's house where I was arrested Tuesday morning about 5:00 o'clock.

(2nd. page)

The foregoing statement was made and signed by me this 8th day of February 1949, in the Sheriff's office in Martin County, before the following officers, whom I know to be officers of law.

(Signed) Bennie Daniels

Witnesses:

Ruel W. Tyson

Lester D. Page

L. E. Manning

S. G. Gibbs

NORTH CAROLINA

PITT COUNTY

IN THE SUPERIOR COURT

STATE

vs.

BENNIE DANIELS and  
LLOYD RAY DANIELS

O R D E R

THIS CAUSE coming on to be heard, and being heard by consent on September 29, 1949, before the undersigned Judge of the Superior Court, at Kinston, North Carolina, upon motion of Wm. J. Bundy, Solicitor Fifth Judicial District, to strike out defendants' statement of case on appeal for failure of defendants to make up and serve statement of case on appeal within time fixed by the Court, the State being represented by Wm. J. Bundy, Solicitor Fifth Judicial District, and the defendants by Herman L. Taylor and C. J. Gates, the Court finds the following facts:

The above entitled case was tried before the undersigned Judge of the Superior Court at the regular term of the Superior Court of Pitt County beginning Monday, May 30, 1949. During said week of the trial of this case, it appearing to the Court that said term would expire before the completion of the trial of this case, an order was entered that said term be and the same was thereby continued until this case was completed and disposed of.

From verdict of guilty of murder in the first degree as to both defendants and judgment thereupon of death as provided by law the defendants gave notice of appeal and the following appeal entries were made:

"Notice of appeal given in open Court; Further notice waived, 60 days allowed defendants to make up and serve statement of case on appeal, 45 days there after allowed the State to make amendments thereto or statement of counter-case on appeal."

This case was completed and disposed of, and Court adjourned on June 6, 1949.



Statement of case on appeal was left in the office of the Solicitor of the Fifth Judicial District with the Solicitor's secretary, by the attorneys for the defendants on August 6, 1949, and a receipt taken from said secretary, in the absence of the Solicitor, as follows:

"Statement of case on appeal accepted by me this 6 day of August, 1949.

Wm. J. Bundy  
by /s/ Mrs. M. H. Fields "

There was no extension or waiver of time within which to make up and serve statement of case on appeal other than contained in the appeal entries, and none requested.

The Solicitor, in serving amendments or exceptions to the defendants' statement of case on appeal, same being served on Herman L. Taylor, one of the attorneys for the defendants, by the Sheriff of Bertie County, on September 5, 1949, made reservations of rights as follows:

"The undersigned Solicitor of the Fifth Judicial District, not waiving any rights, and specifically reserving and now reasserting exception by the State to the failure of the defendants to serve Statement of Case on Appeal within the time fixed by the Court, and renewing its motion to strike the said Statement of Case on Appeal from the record, objects to the Statement of Case on Appeal as left at the Solicitor's office and offers the following exceptions or amendments thereto:"

Written motion to strike out defendants' statement of case on appeal, for failure by the defendants to make up and serve statement of case on appeal within the time fixed by the Court was filed by the Solicitor, and served on Herman L. Taylor, one of the attorneys for the defendants, by the Sheriff of Wake County, on September 16, 1949.

The defendants, through their attorneys, Herman L. Taylor and C. J. Gates, admit that statement of case on appeal was left in the Solicitor's office with his secretary on August 6, 1949, and that same was not within the time of 60 days fixed by the Court.

The defendants' said statement of case on appeal, left in the Solicitor's office on August 6, 1949, as aforesaid, was not served within the 60 days fixed by the Court for the defendants to make up and serve statement of case on appeal.

It is agreed that order ruling upon said motion may be signed in or out of Lenoir County, and Fifth Judicial District.

IT IS, THEREFORE, ORDERED that the motion of the Solicitor for the State to strike out the defendants' statement of case on appeal be and the same is hereby allowed; and said statement of case on appeal is hereby stricken out.

This the 1st day of October, 1949.

Clawson L. Williams  
Judge Superior Court

To the foregoing the defendants object and except and appeal to the Supreme Court.

Clawson L. Williams  
Judge Superior Court

J. D. JOYNER (Federal Transcript) TESTIFIED AS FOLLOWS:

### CROSS-EXAMINATION

Q. Mr. Joyner, as clerk to the board of commissioners did you write the minutes of the board?

A. Yes, sir.

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Q. Are these the minutes of the board of commissioners May 5, 1947?

A. Yes, sir.

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Q. Will you read that paragraph having to do with preparation of the Jury list?

MR. ROGGE: May I see that?

MR. BUNDY: Yes, sir.

MR. ROGGE: No objection.

- A. "On motion of G. H. Pittman, seconded by M. W. Smith, the clerk was instructed to make up, with the assistance of the county attorney, a list of all eligible persons for jury service from the county registration books and/or all the county tax books and/or any other source they may deem advisable. The clerk and county attorney were further instructed to present said list to the board for consideration at the regular meeting on the first Monday in June".

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- Q. When your list went to the commissioners was there any distinction as to what they were as to race?

- A. The only distinction was by the township.

THE COURT: You don't mean distinction as to race?

- A. No, sir. By township only.

S. M. UNDERWOOD (Federal Transcript) TESTIFIED  
AS FOLLOWS:

**DIRECT EXAMINATION**

- Q. You are Sam Underwood?

- A. Yes, sir.

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- Q. What position have you held with reference to Pitt County?

- A. I served as county attorney.

- Q. How long?

- A. Mr. Moody, if I recall correctly I was appointed in September, 1946 and served through this month.

- Q. I wish you would state what you did with the board of commissioners if you met with them, and what advice you gave them with reference to the drawing of the jury in June, 1947 when a new list was made up for the odd year?

- A. Well, sir, it was in that year that the effect of the amendment regarding women serving on juries was to be felt. After a conference with your office about the matter ow women serving on the juries I met with the commissioners, discussed that phase of it with them and pointed out to them the import of the decision of the Supreme Court of the United States with regard to negroes serving on juries in North Carolina and advised them that they should take every precaution to see that no negro was excluded, since they were going to revise the jury list anyway to go ahead and prepare it absolutely in accordance with the law.

D. T. HOUSE, JR. (Federal Transcript) TESTIFIED AS FOLLOWS:

#### CROSS-EXAMINATION

- Q. Does your recollection enable you to state whether any negroes have been customarily drawn on the panel since 1947?
- A. We have had negroes on practically all the panels since 1947. I couldn't say but sometimes one and sometimes two. I have seen as high as four or five.
- Q. Isn't it a fact they actually serve on the petit juries?
- A. Yes, sir.
- Q. In criminal as well as civil cases?
- A. Yes, sir.
- Q. And isn't it a fact that that is not only just a rare occurrence but a common occurrence?
- A. Yes, sir, it is.
- Q. In the term of court at which these petitioners were tried were there not several negroes on the jury panel?
- A. As I recall there was. There had to be because we had one on the jury that tried him.

#### RE-CROSS EXAMINATION

THE COURT: You remember whether any negro was drawn other than the one that actually sat in the case?



A. I remember the negro undertaker. He was not excused until his name was drawn out of the hat.

THE COURT: His name was drawn out of the hat and because of the nature of his business as undertaker he was excused?

A. Yes, sir.

THE COURT: Do you remember whether any other negro's name was drawn from the hat?

A. The negro woman.

THE COURT: She was opposed to capital punishment and I take it the Judge excused her.

MR. BUNDY: I did.

THE COURT: Was any other negro called?

A. I don't remember.

CHARLES P. GASKINS (Federal Transcript) TESTIFIED AS FOLLOWS:

### CROSS-EXAMINATION

Q. You were in office when this panel was drawn for this trial?

A. Yes, sir.

Q. You know of any acts done by anyone to practice discrimination to keep colored people from being on the jury?

A. No, sir. There is no way in the world I know of to tell when the scroll is drawn from that jury box to tell whether the man is white, black, or any color, and no attempt during my sitting in with the board of commissioners during drawing the jury to prohibit any man from sitting on the jury of Pitt County.

W. J. SMITH (Federal Transcript) TESTIFIED AS FOLLOWS:

### DIRECT EXAMINATION

Q. State your name and address?

A. W. J. Smith, Bethel, Pitt County.

- Q. What position do you hold in Pitt County?
- A. None at this time.
- Q. What county office did you hold at the time of this trial and before?
- A. Chairman of the board of county commissioners.
- Q. When did you take office?
- A. December, 1946, I think.

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- Q. When you received the list was there any mark or anything on the list that disclosed to you the race of anybody on the list?
- A. No, sir. When the list came to us it was divided by district to each of the commissioners and they went over it. Purged any name of any person dead or they felt didn't meet qualifications morally or of sufficient intelligence.

MRS. R. P. WHEELLESS (Federal Transcript) TESTIFIED AS FOLLOWS:

#### CROSS-EXAMINATION

- Q. Did anyone instruct you at all to leave out the names of white people or colored people?
- A. Not that I recall.

MRS. STEVE JOHNSTON (Federal Transcript) TESTIFIED AS FOLLOWS:

#### CROSS-EXAMINATION

- Q. When you made the list up did anybody tell you to leave out any colored people?
- A. No, sir.
- Q. When you got the list back after the commissioners met did you have the same list?
- A. I didn't know any difference.
- Q. It looked about the same?
- A. Yes, sir.

MR. W. J. SMITH (Federal Transcript) TESTIFIED AS FOLLOWS:

RE-DIRECT EXAMINATION

Q. You have been living in Bethel all your life except when in school?

A. Yes, sir.

Q. You are well acquainted with the people who live in that township, both white and colored?

A. Yes, sir.

Q. What is the nature or character of the negro population in Bethel Township with respect to intelligence and avocations?

A. Majority of negroes in our township of course are tenant farmers and day laborers. They have had very little schooling. That situation is improving.

Q. What would you say with respect to the situation as to the negro population in and around Bethel with respect to moral character as determined by court and other things?

A. You are asking about the entire negro population of the township?

Q. Yes, so far as you can say?

A. I have this kind of a situation. We have some fifty or seventy-five that work for us and invariably Monday morning we have five, six or seven we have to pay fines for for rowdiness, drinking and things of that kind Saturday and Sunday.

Q. Is that typical or indicative of the general situation?

A. I think it is.

Q. I will ask you to state whether in the selection of this jury list and deletions in making it up you acted in good faith with respect to the requirements of the law as best you could?

A. That and that alone.

Q. Was it your purpose to get negroes out of the jury panel or to get them in?

A. If I had any preference it was to put every one I thought qualified on. Certainly not to cut any of them out.

J. VANCE PERKINS (Federal Transcript) TESTIFIED AS FOLLOWS:

CROSS-EXAMINATION

THE COURT: What policy did you pursue in putting names in the jury box or on the scroll in respect to age? Suppose a qualified person, negro or white, was of advanced age or years would you put him in the box?

A. No, sir.

Q. You know whether any of these you referred to as being qualified were of advanced age?

A. Yes, sir, Shade Wilson is seventy-two years old.

Q. Did you eliminate any person because of race?

A. No, sir, absolutely not.

MR. BUNDY: That is all.

M. W. SMITH (Federal Transcript) TESTIFIED AS FOLLOWS:

CROSS-EXAMINATION

THE COURT: Did you strike off any individual on account of his or her race?

A. No, sir.

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Q. What type and kind of negroes generally make up the negro populations in those two townships?

A. You mean as to their quality for serving on the jury, intelligence and moral character? I would say a large part of them wouldn't be competent to serve on the jury. O

Q. For lack of intelligence?

A. Sometime for that and sometime because they didn't have moral character. Of course you find many white people the same way.

Q. Isn't it a fact that almost exclusively the population in these two townships is made up of tenant farmers and farm laborers?

A. That's right. I venture to say seventy-five percent of the colored people of those two townships were just



on the tax books for poll tax. A large portion of them move two or three times a year, some once a year and some in several years but if qualified for jury service otherwise they would not be good for jury service for that reason.

M. D. HODGES (Federal Transcript). TESTIFIED AS FOLLOWS:

CROSS-EXAMINATION

Q. You instructed the clerk of the board of commissioners to prepare list from the registration books and tax list?

A. And any other source.

Q. You didn't stick your head over his shoulder all the time to see what he was doing?

A. No, didn't have time.

Q. Is county commissioner a full time occupation?

A. No, sir.

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Q. How long have you lived in that section?

A. Approximately twenty-six years.

Q. Familiar with the type of people that live in that community?

A. I think so.

Q. What about the intelligence and moral character of the colored people in that section?

A. A few of them reliable and big percent of them get in a lot of trouble, lot of drinking and carrying on and petit crimes.

Q. What about their intelligence, ability to sit on a jury and pass on people's lives?

A. Mighty few capable of serving on a jury.  
That is all.

SHERIFF RUEL W. TYSON (Federal Transcript) TESTIFIED AS FOLLOWS:

## RE-CROSS EXAMINATION

- Q. You are in court practically every court?
- A. Most every court. We have had a few criminal courts when I was sick and been so I didn't attend.
- Q. Do members of the negro race serve, drawn and are in court at practically every term of court?
- A. Most every term of court there are some.
- Q. Are there as many as several on each panel?
- A. I don't know what court but I remember one court this year that I have seen as many as four sitting on one case.

THE COURT: You mean in the box?

A. Yes, sir.

THE COURT: Was that a criminal case?

A. I am not positive but I believe it was.

THE COURT: You know whether the defendant in that case was white or negro?

A. I don't recall.

Q. Have you seen negroes sitting in the box on a jury when white defendants were being tried?

A. Yes, sir, I have.

Q. And I ask you if you didn't see that before the Daniels case was tried?

A. Yes, sir, I have.

Q. And since?

A. Yes, sir.

Q. And I ask you whether or not you have seen me as solicitor leave them on the jury?

A. Lots of times.

Q. Court after court?

A. Yes, sir.

Q. And in case after case?

A. Yes, sir, lots of times.

M. B. HODGES (State Transcript) TESTIFIED AS FOLLOWS:

## DIRECT EXAMINATION

Q. You are Chairman of the board of county commissioners of Pitt County?

A. Yes.

Q. Did you help make up this jury list, the scroll in the box?

A. Yes.

Q. I hand you seven scrolls taken from Jury Box No. 1, all showing a mark with a red pencil. Can you explain why these red marks are on the scrolls?

DEFENDANTS OBJECT. OVERRULED. EXCEPTION.

A. When this list was prepared and given to us each commissioner was given a list for the people in his district. My district is number 5, and in going over that we used a red pencil to make a mark by everybody's name that we thought were qualified to serve. There were two columns on a sheet and we took a pair of scissors and cut them off and they didn't cut all the red mark off.

Q. In making the pencil mark on the right margin the mark extended to the left on the other list?

A. Yes, sir. You take a pencil going over two or three thousand names it will go over on the others.

Q. After each commissioner made a mark indicating the names of persons who were not qualified did the Board of County Commissioners make up the list?

DEFENDANTS OBJECT. OVERRULED. EXCEPTION.

A. Yes, we brought them in to the Clerk and told him to prepare them, and put them in the jury boxes.

MARVIN W. SMITH (STATE TRANSCRIPT) TESTIFIED AS FOLLOWS:

## DIRECT EXAMINATION

- Q. You are a member of the Board of County Commissioners?
- A. Yes.
- Q. Were you in June 1947?
- A. Yes, sir.
- Q. I hand you eight scrolls taken from jury box No. 1 showing a red mark on each scroll. Can you explain to his Honor what caused those red marks to be there?
- A. I can explain the ones that I put on there; it was done in marking off the name next to this name. We used a red pencil to mark through the name of those to be eliminated; that's the way I did it.
- Q. BY THE COURT: Marking through the names opposite on each scroll?
- A. Yes, sir.
- Q. Were the names on sheets of paper two columns to the sheet?
- A. They were on sheets about six or eight inches wide and about ten inches long and the names ran along, a very little space separating the names.
- Q. These names are cut out?
- A. Yes. You see if you mark the one out next to it if you weren't careful you would mark too near it and hit the next name.
- Q. When this little mark came over on this scroll or came over marking out the name opposite?
- A. Yes, that's the way I did the ones I did.
- Q. You said you went over the list and marked out certain ones that you knew and then the commissioners made up the list?
- A. After we got through with the list they were turned over to the Clerk and he clipped out the ones that weren't checked off and then they went in the jury box.

M. B. HODGES (STATE TRANSCRIPT) TESTIFIED  
AS FOLLOWS:



## DIRECT EXAMINATION

Q. I hand you a scroll bearing the name of James Ray Pittman, Ayden, North Carolina. Over "Ayden" is written in pencil "Greenville." Do you know James Ray Pittman?

A. Yes, sir. He lives in Greenville now. When they made up the list they had a lot of the addresses wrong and when we knew they had moved to another township we erased it and wrote it with a pencil. We don't have a typewriter.

Q. BY THE COURT: His residence was corrected on there before it went in the jury box?

A. Yes.

Q. BY THE COURT: Was it passed upon in its present shape by the Board of County Commissioners?

A. Yes, sir, absolutely.

Q. Did you reject any person on the list you adopted except for want of moral character and sufficient intelligence?

A. Personally I did.

Q. What for?

A. Physical disability. Mr. Ken Price in Swift Creek is on crutches; Mr. Alton Chapman.

Q. Except for physical disability, lack of sufficient intelligence or moral character did you reject any one?

A. No, sir.

BY THE COURT: Was any person rejected or excluded when you make up the scroll to put the names in the boxes because of race or color?

A. No, sir.

Q. BY THE COURT: Did you know or did you have any information bearing on the jury list as to each of the persons whose names thereon were white and which were colored?

A. No, sir, we didn't have any way of telling unless we personally knew them.

Q. When the scrolls were put in the jury boxes did you mark any of them in any way to indicate which were

white and which were colored?

A. No, sir.

Q. Is there anything on the scrolls in the jury boxes indicating names of white or colored persons written on them?

A. No, sir. I know there isn't; If there is I can't tell it from looking over them.

Q. Have you examined the scrolls in box No. 1 and Box No. 2 under the supervision of the court?

A. Yes, I have.

Q. BY THE COURT: Did you find any such mark of distinction on any of them?

A. No, sir.

Q. Is there any question about this list being the jury jury list from which the scrolls were taken and put in the jury boxes?

A. No, sir.

CHARLES P. GASKINS (STATE TRANSCRIPT) TESTIFIED AS FOLLOWS:

#### DIRECT EXAMINATION

Q. You are Register of Deeds?

A. That's right

Q. Were you register of deeds in June 1947?

A. No, I went in July 15, 1947.

Q. As Register of Deeds are you clerk to the board of Commissioners?

A. That is correct.

Q. Since the time you have been in that office has this been in your custody and possession?

A. Yes, sir.

Q. Identify it please.

A. This is the jury scroll book. Each time the jury scroll is made up, the first Monday in June of every two years, copy of the names are placed in the jury box. In here we have the jury scrolls for the years 1941, 1943, 1945 and 1947.

Q. The record of the 1947 jury scroll?

A. Yes.

Q. List and scrolls?

A. Yes, sir.

Q. BY THE COURT: Is there anything on this scroll or on that list to indicate whether the person's name thereon is white or colored?

A. Nothing that I know of.

Q. Examine it and see.

A. I have examined it.

Q. Does it contain any mark of identification showing whether or not any person is white or colored?

A. None that I have seen.

Q. Are they now in the condition they were when originally made out?

A. Just exactly the way they were the first time I saw them.

Q. They have been in your possession at all times?

A. That's right.

Q. BY THE COURT: Did you put the scrolls in the boxes?

A. No, sir.

Q. Do you know who did?

A. Mr. J. D. Joyner.

Q. BY THE COURT: You did not make out that list?

A. No, sir.

Q. It was a part of the record of your office when you qualified?

A. Yes, sir.

SAM B. UNDERWOOD (State Transcript) TESTIFIED  
AS FOLLOWS:

#### DIRECT EXAMINATION

Q. What is your vocation?

A. I am a practicing lawyer in this town.

Q. Do you hold an official position with the County?

A. Yes, sir, I am County Attorney.

- Q. How long have you been County Attorney?
- A. It was either 1945 or 1946 that I was first employed.
- Q. Were you County Attorney prior to and during June 1947?
- A. Yes.
- Q. In the capacity of County Attorney state whether or not your duties among other things consisted of advising the board of county commissioners?
- A. They do.
- Q. State whether or not you sit with the board of commissioners and advise them and observe with them in making up the jury list and did so in June 1947?
- A. I didn't actually sit with the board of commissioners all during the time they were doing it.
- Q. BY THE COURT: State what you saw or done.
- A. As a consequence of the adoption of the amendment relating to women serving on juries the county commissioners asked me to assist Mr. Joyner, who was then clerk to the board, in getting an additional list of names so it would comply with that amendment about women. After a conference with the Attorney General of the State of North Carolina—

DEFENDANTS OBJECT. SUSTAINED (Don't state any thing he said).

DEFENDANTS OBJECT to what witness said in reference to the County Board of commissioners and move to strike out.

MOTION DENIED. DEFENDANTS EXCEPT.

- A. After this conference Mr. Joyner obtained a copy of the persons registered to vote in Pitt County by Townships, and Mr. Joyner—the clerk in his office—prepared that list of names and compared that list with the list of tax returns for the prior years. That list, or combination of the two lists, was then submitted to the board of county commissioners. I called the board's attention to the Supreme Court's decision of this State—



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DEFENDANTS OBJECT. OVERRULED. EXCEPTION.

and the Supreme Court of the United States with reference to the exclusion of negroes from the jury list. I was not present when the scrolls were actually cut and was not present, of course, all during the time the board of commissioners were making up the list. That's the explanation that I know of making up the list.

Q. Did you see the list at any time?

A. Yes, sir.

Q. Was there anything on the list to designate whether the ones on there were white or colored?

A. No, sir.

J. D. JOYNER (State Transcript) TESTIFIED AS FOLLOWS:

### DIRECT EXAMINATION

Q. What is your official capacity with the County?

A. Tax Collector and supervisor.

Q. In June 1947 were you tax collector and supervisor?

A. At that time I was Register of Deeds.

Q. As such you were Clerk to the Board of Commissioners?

A. Yes, sir.

Q. I ask you to state whether or not the first Monday of July 1947 you submitted to the Board of Commissioners a jury list?

A. Yes, sir.

DEFENDANTS OBJECT.

Q. Did you lay a list of the tax payers, persons over 21 years of age residing in Pitt County before the board of commissioners in June 1947?

A. Yes.

Q. On the first Monday in July 1947, following that, state whether or not at the regular meeting of the board the scrolls were made out and put into the box?

A. Yes.

Q. You were present as Clerk of the Board when that was done?

A. Yes.

Q. Were you present when the jury list was made out by the Commissioners?

A. Not all together.

Q. BY THE COURT: What part of the time were you present?

A. The list as I had made it up was divided into districts the commissioners represented and I turned that list over to the commissioners. I was present part of the time but I wouldn't state that I was present with them the entire time.

Q. Were you present with the board at its meeting when it considered adopting the jury scroll?

A. Yes.

Q. What was done, if anything, with regard to discussion of the race to which the persons whose names were on the scroll?

A. Not anything to my knowledge or recollection.

Q. While you were present was anybody rejected because of the race to which they belonged?

A. Not to my knowledge.

Q. Was there any rejection except for want of moral character and sufficient intelligence?

A. Not to my knowledge.

Q. You say the list was divided and given to each commissioner for his district?

A. Yes.

Q. In July when the list was actually made up do you say that each commissioner then brought his list back and submitted it to the full board of commissioners?

A. Yes.

Q. At which time did the full board of commissioners approve each list?

A. They approved the list entirely.

JAMES VANCE PERKINS (State Transcript) TESTIFIED AS FOLLOWS:

## DIRECT EXAMINATION

Q. Do you live in Greenville?

A. Yes.

Q. Are you a member of the Board of County Commissioners?

A. Yes.

Q. Were you a member of that board in June 1947?

A. I have been on the board 2½ years. I went in in December 1946. I was elected in the fall of 1946.

Q. Were you on the board when the tax list was prepared in 1947?

A. Yes.

Q. Did the then Clerk to the Board and Register of Deeds submit to the Board of Commissioners the first Monday in June the tax returns for the previous year and a list of those 21 years of age?

A. Yes, that's right.

Q. What was done with the total list? What did you do with respect to any part of it?

A. I checked over the list for Greenville Township.

Q. Did you have any one assist you?

A. Yes, sir, Mr. Gaskins assisted me; he knew some of them that I didn't know.

Q. After you had gone over your list did you return and submit that to the full board of commissioners in July?

A. Yes.

Q. Was it approved then by the Board?

A. Yes.

Q. Was that done with respect to the list each commissioner had for his district?

A. Yes.

Q. Did you eliminate any one from your list for your district because of his race?

A. No.

DEFENDANT'S OBJECT. OVERRULED. EXCEPTION

Q. Did you eliminate any one for any purpose than for

lack of moral character and sufficient intelligence?

A. No.

Q. Was there anything to distinguish as to race as to the individual names on the list?

A. No.

Q. Did the board adopt the scrolls and list of jurors?

A. Yes, sir.

Q. In passing on it was any one eliminated by the board except for lack of intelligence and moral character?

A. No.

Q. Was there any discussion by the board when the jury list or scroll was adopted about the race to which any person belonged?

A. No, sir.

Q. Was any distinction made on the basis of race?

A. No.

Q. Was any one excluded on that ground?

A. No.

W. J. SMITH (State Transcript) TESTIFIED AS FOLLOWS:

#### DIRECT EXAMINATION

Q. Were you on the board of county commissioners in 1947?

A. Yes.

Q. At that time I believe you were chairman?

A. That's right.

Q. You are not a member of the board at present?

A. Not at present.

Q. Was a jury list prepared during that year by the board of county commissioners?

A. It was.

Q. Who prepared the list and submitted it to the board?

A. The Clerk to the Board, the Register of Deeds, Mr. Joyner.

Q. Did you direct him and do you know from what he obtained that list?



A. Of course we called in our county attorney, and this list came, as I recall from the registration books, from the tax books and such other sources as we could get them.

Q. When the list was submitted to the full board on the first Monday in June what did you do with it?

A. The list was divided into townships with each commissioner taking the townships in his district and gone over very carefully by each man and any name of any person found of not normal intelligence and moral qualifications was purged; it was then returned to the full board and we went over it again.

Q. Was any list that you made of your district submitted to and approved by the board?

A. Yes, sir.

Q. Was that adopted as the jury list?

A. Yes.

Q. In your own district, which comprised the north side of the river except Greenville?

A. That is correct.

Q. State whether you eliminated any person from the list because of his race?

A. None at all.

#### DEFENDANTS OBJECT. OVERRULED.

Q. State whether you eliminated any person's name from the list for any reason other than lack of moral character and sufficient intelligence to serve on a jury?

A. I did not.

Q. When that list of yours and the other four members of the Board were submitted to the county commissioners you say the full board went over each list again?

A. That's right.

Q. And adopted it?

A. That's right.

Q. That was the first Monday in July?

A. I think so.

Q. At the time the jury list was adopted and scrolls made

accordingly at the meeting of the full board was any person eliminated therefrom because of race?

DEFENDANTS OBJECT.

A. No.

OBJECTION OVERRULED. EXCEPTION BY DEFENDANTS.

Q. Were any names eliminated at the meeting of the full board which adopted the action of the commissioners for their districts for any reasons other than lack of moral character and sufficient intelligence to serve on a jury?

A. No.

Q. Was anything on the list to indicate or designate whether the person was white or colored?

DEFENDANTS OBJECT. OVERRULED. EXCEPTION.

A. There was not.

Q. BY THE COURT: When you caused the scrolls to be put in the jury box was anything on the scrolls indicating whether or not the name of the person on the scroll was white or colored?

A. There was not.

Q. Was anything said about that?

A. No, sir.

DEFENDANTS OBJECT. OVERRULED. EXCEPTION.

Q. Hand you a slip that was taken from jury box No. 2, on which appears the name of G. W. Roebuck, Carolina Township. Do you know Mr. Roebuck personally?

A. I do.

Q. There is a red mark on there. Does that have any significance?

A. None whatever that I know of.

DEFENDANTS OBJECT. OVERRULED.

Q. BY THE COURT: Do you know how it came to be there?

A. No, sir, I do not.

Q. State whether or not along about that time you were having trouble with your eyes?

A. I was.

Q. Did you use a red pencil in checking this list?

DEFENDANTS OBJECT. OVERRULED. EXCEPTION.

A. I may have used a red pencil on it for the purpose of checking some that would go in or not. It has no significance whatever.

Q. BY THE COURT: You said your board caused these scrolls to be put in the jury box?

A. Yes, sir.

Q. Approximately the same size scrolls?

A. Yes, sir, these lists were clipped.

G. H. PITTMAN (State Transcript) TESTIFIED AS FOLLOWS:

#### DIRECT EXAMINATION

Q. Are you a member of the board of commissioners of Pitt County?

A. Yes.

Q. Were you in July 1947?

A. Yes.

Q. I ask you if the board of county commissioners had the Clerk to the board to make up a jury list from the registration books, tax returns and other information available in June 1947?

A. Yes.

Q. What then did you do about selecting the available members?

A. I looked over the list in my district, Faulkland, Fountain, Beaver Dam and Farmville.

- Q. What action did you take on that at your July meeting?
- A. We went over the list and looked over the names. You see there were several in the box that were dead and of course we got them out, and where there was any duplication, that was all.
- Q. Did you eliminate anybody on account of race?

DEFENDANTS OBJECT. OVERRULED. EXCEPTION.

- A. No, sir.
- Q. Could you tell from the list prepared whether the name represented a white or colored person; was there any indication on that list to show whether or not the name represented a colored person or a white person?
- A. No, sir.
- Q. In the scrolls that were made and put in the jury box was there any mark on the scroll to show whether they represented a white or a colored person?
- A. No.
- Q. Was there any discussion at your meeting either in June or July as to whether or not certain people were colored or white?
- A. No, sir, there was not.
- Q. Did you exclude anybody from that list except the ones that did not have sufficient intelligence or wasn't of good moral character, or such names as were duplicated on the list?
- A. No.
- Q. I hand you scroll taken from box No. 2 "Alford H. Lewis, Farmville Township"—it has a little red mark at the end of the scroll. Do you know why that mark is there?
- A. No, I don't know anything about it. I don't know whether he is white or colored.
- Q. Did that mark signify to you whether this man is white or colored?
- A. No, sir, I don't know anything about the mark.
- Q. Does it have any significance at all so far as you are concerned?



A. No, sir, not a thing.

Q. I hand you two scrolls taken from jury box No. 1., one bearing the name of "Mrs. C. W. Gaynor, Fountain Township," the other "C. W. Gaynor, Fountain Township", which appears to have a red mark across the name.

A. I know both of them.

Q. Do you know why that mark is on there?

A. No.

Q. Does it have any significance to you at all?

A. No, sir, not a thing.

Q. Does it indicate to you whether these people are white or colored?

A. No, sir, I know them both; they are both white, and live just beyond where I live.

Q. BY THE COURT: Are they people of good moral character?

A. Yes, sir.

Q. Sufficient intelligence to serve on a jury?

A. Yes, sir, I think so. His wife is a school teacher and he is alright; I have never heard anything against him.

Q. He is one of the prominent people of the county?

A. Yes, sir, K. R. Wooten's nephew.

NORTH CAROLINA  
PITT COUNTY

SUPERIOR COURT  
MAY-JUNE TERM, 1949

STATE OF NORTH CAROLINA

VS.

BENNIE DANIELS and  
LLOYD RAY DANIELS

FINDINGS OF FACT AND RULING UPON  
MOTION TO QUASH and CHALLENGE TO  
ARRAY OF JURORS.

This case having been duly and regularly calendared for trial, and coming on for trial, at the May 30th, 1949, term of the Superior Court of Pitt County, North Carolina, before the under-signed Judge presiding, duly assigned by rotation to conduct said court, and upon the calling thereof the Sheriff of Pitt County produced the defendants before the Court, when and where the defendants and their counsel, C. J. Gates, Esq. and Herman L. Taylor, Esq., presented and offered to the Court a motion to quash the Bill of Indictment, and challenge to the array of petit jurors, upon the grounds stated in said motion; and the Court proceeded to hear evidence bearing thereon as set out in the record, the said motion being duly signed and verified by each of the defendants, Bennie Daniels and Lloyd Ray Daniels, and signed by their counsel; and after hearing the evidence thereon, and inspection of the records and documents offered in evidence before the Court, the Court finds:

1. That at the March 1949 term of the Superior Court of Pitt County, North Carolina, the defendants were charged upon a Bill of Indictment reading as follows:

"STATE OF NORTH CAROLINA March Term, 1949  
PITT COUNTY" SUPERIOR COURT

The jurors for the State upon their oath do present,  
That Bennie Daniels and Lloyd Ray Daniels, late of  
Pitt County on the 5th day of February, A.D. 1949,

with force and arms, at and in the said County, feloniously, willfully, premeditatedly and deliberately, and of his malice aforethought, did kill and murder William Benjamin O'Neal, contrary to the form and the statute in such case made and provided, and against the peace and dignity of the State.

Wm. J. Bundy,

Solicitor."

which aforesaid Bill of Indictment was sent before the Grand Jury for said term; and, after hearing evidence and examining witnesses thereon, the Grand Jury in open court, in a body, returned the said Bill, and found the same "To Be A True Bill" as will appear from the Minutes of this court, in Minute Book, No. 27 at page 133. That thereupon, upon suggestion that the defendants were charged with the crime of murder in the first degree, a capital offense under the laws of North Carolina, and were without counsel and were financially unable to provide counsel, the Court duly assigned and appointed Hon. Arthur B. Corey and Hon. W. W. Speight, members of the Bar, in good standing, residing in, and engaged in the practice of law before the courts of Pitt County, to represent said defendants; and subsequently thereto the defendants represented by counsel assigned to them appeared before the court and were duly and properly arraigned upon the Bill of Indictment returned by the Grand Jury as aforesaid, and, upon their arraignment, each entered a plea of "Not Guilty" and for their trial placed themselves upon God and their country; that thereupon, upon motion of counsel for defendants, the trial of defendants was continued until the next succeeding term of this court, and the defendants were committed to the care and custody of the State Hospital for insane negro persons at Goldsboro, North Carolina, and to I. C. Long, M.D., Superintendent of the State Hospital and an expert psychiatrist, for the purpose of examining into and study of their mental condition, under order of His Honor R. Hunt Parker, Judge presiding at said term.

2. That subsequent thereto, and at the regular April Term 1949 of the Superior Court of this County, this case was called, and it appearing to the Court that the Superintendent of said hospital had not completed his examination as to the mental condition of the defendants, and still held them under commitment heretofore made by the Court, upon motion of counsel for the defendants the trial of the cause was continued until the next succeeding term of this court for the trial of criminal cases, scheduled to convene on the 30th day of May 1949. That at said April Term of this court the defendants had employed to represent them in the investigation and trial of this case as attorneys at law C. G. Gates, Esq. and Herman L. Taylor, Esq., members of the Bar in Wake and Durham Counties, North Carolina, in good standing. That thereupon, the aforesaid counsel having accepted employment to represent the said defendants in this case, the counsel heretofore assigned by the Court were discharged by the Court, and the case continued until the May 30th 1949 term, as aforesaid. That on the 24th day of May, 1949, the defendants were returned to the custody of the Sheriff of this County, with a report from I. C. Long, M.D., Superintendent of the State Hospital for negro insane persons, at Goldsboro, N. C., setting forth that each of the defendants has sufficient intelligence to know right from wrong, and is able to stand trial upon the Bill of Indictment heretofore returned by the Grand Jury in this case.

3. That this case was duly and regularly calendared for trial at this term of court convening on the 30th day of May 1949, as aforesaid. That upon calling the case for trial as above set out, the defendants presented a motion to quash the indictment and challenge to the array of petit jurors, as set out in the record, the defendants stating in open court through their counsel that the challenge was on the grounds set out in the motion as to the method of operation of the administration machinery provided for the selection of jurors, and that they made no objection to the method, prescribed by the statutes of this State as contained in Chapter 9, articles 1, 2, 3, 4 and 5, and sections



thereunder, of the General Statutes of North Carolina, enacted by the General Assembly of said State at its session held in 1943, and amendments thereto particularly the amendment contained in the supplement to said General Statutes, as set out in Chapter 1007, Section 1, of the laws of the General Assembly of North Carolina enacted at its session of 1947:

4. The Court further finds as a fact that, as set forth in Chapter 9, article 1, section 1, of said General Statutes and amendments thereto, above referred to, the qualifications of jurors and manner of selecting the list of jurors are set forth in Chapter 9, article 1, as amended, reading as follows:

“Art. 1. JURY LIST AND DRAWING OF ORIGINAL PANEL.

9-1 Jury list from taxpayers of good character.

The board of county commissioners for the several counties, at their regular meetings on the first Monday in June in the year 1947, or the jury commissions or such other legally constituted body as may in the respective counties be charged by law with the duty of drawing names of persons for jury service, at the times of their regular meetings, and every two years thereafter, shall cause said clerks to lay before them the tax returns for the preceding year for their county and a list of names of persons who do not appear upon the tax lists, who are residents of the county and over twenty-one years of age, from which lists the board of county commissioners or such jury commissions shall select the names of such persons who reside in the county who are of good moral character and have sufficient intelligence to serve as members of grand and petit juries. A list of the names thus selected by the board of county commissioners or such jury commissions shall be made out by the clerk of the board of county commissioners or such jury commissions and shall constitute the jury list of the county and shall be preserved as such.

The clerk of the board of county commissioners or such jury commissions, in making out the list of names to be

laid before the board of county commissioners or such jury commissions, may secure said lists from such sources of information as deemed reliable which will provide the names of persons of the county above twenty-one years of age residing within the county qualified for jury duty. There shall be excluded from said lists all those persons who have been convicted of any crime involving moral turpitude or who have been adjudged non compos mentis."

5. That prior to 1947 no negro has served on the grand jury in the Superior Court of Pitt County in more than twenty (20) years.

6. That prior to 1947 members of the negro race were occasionally called, summoned and served for the jury duty.

And, it appearing to the Court that, as stated in the opinion of the Supreme Court of the United States by Mr. Justice Black, in the case of *Patton v. State of Miss.*, 332 U.S. 463 at 466: "Whether there has been systematic racial discrimination by administrative officials in the selection of jurors is a question to be determined from the facts in each particular case."

The standard or rule for determination of whether or not there exists discrimination in the selection of jurors is set out by the Supreme Court of the United States in *Akins v. State of Texas*, 325 U.S. 398, at page 403 and 404 and to the bottom of page 405 citing with approval *Hill v. Texas*, 316 U.S. 404—in the *Akins* case.

7. That in 1947 the jury boxes of Pitt County Superior Court were purged, and all names of jurors therein removed therefrom and the scrolls containing the names destroyed; and the board of county commissioners of Pitt County proceeded to select a list of persons qualified for jury service in said county, and, at their regular meeting on the first Monday in June 1947, caused the clerk of said board to lay before them the tax returns for the preceding year for Pitt County and a list of the names of persons who do not appear upon the tax list, who are residents of the county over twenty-one years of age from which lists

the said board of county commissioners proceeded to select the names of such persons who reside in the County, who are of good moral character and who have sufficient intelligence to serve as members of grand and petit juries, and caused a list of the names thus selected by the Board of county commissioners to be made out by the clerk of said board of county commissioners, which said list of persons so qualified was adopted by them as the jury list of said Pitt County and was preserved as such, and this jury list offered in evidence before the Court; that upon an inspection of the jury list offered in evidence, it shows that there is no mark thereupon identifying the name of any person on said list except the township in which they reside. That there is nothing on said list identifying any person, whose name appears thereon, as being of either the white or the negro race, and nothing on said list indicating whether any person was of the white or negro race, and nothing to identify such person as a member of either race.

8. That the said board of commissioners consists of five members, one member being selected from each of five districts within the county, and elected by the qualified voters of the county, each district comprising an area representing a combination of townships, and that upon said list of persons being laid before said board, a list of the persons residing within the area represented by each member of the board of commissioners, was submitted to and carefully screened and examined by the member of the board representing that area.

9. That in screening and making an examination of the list of said persons to ascertain and determine their qualifications as jurors, the members of said board called upon, and received assistance from, and consulted with, persons in their township who were familiar with and know the citizenship thereof and make an honest, careful investigation to determine whether or not such persons possessed the qualifications to serve as a juror, and possessed the qualifications required by the statutes of this State to serve upon juries in Pitt County, rejecting and

eliminating therefrom the names of those persons whom they found to be disqualified, or who did not possess the qualifications required by the statutes, as aforesaid.

10. That in so doing, no person was excluded, or rejected, from said list because of race or color, and that in the consideration of said list no discussion or consideration was given to the fact that any particular person was either a member of the white or negro race, but that only such persons were rejected as did not possess the qualifications for jury service required by the laws of this State, as set out in General Statutes, Chapter 9, section 1, et seq., above referred to.

11. That, after checking, examining and screening the list of persons by each member of said board of county commissioners who lived in the district represented by him, in which said persons resided, at a meetings of said board of county commissioners on the first Monday in July 1947, the aforesaid lists were all submitted to and examined by the said board of county commissioners of Pitt County, to ascertain and determine the persons thereon who possessed the qualifications to serve as jurors in said county, as set out in the said statutes. That in so doing the said board of county commissioners did not reject any person on account of race or color, and no negro was rejected because of his race. That the only persons rejected were those whom the board of county commissioners found to be not qualified to serve as jurors.

12. That the list considered by said board of county commissioners at its meeting in July 1947 contained the names of persons over twenty-one years of age residing in the county as set out upon the tax list; and those whose names did not appear in the tax list secured from reliable sources of information likely to provide the names of persons qualified for jury duty. That amongst the list so considered were the registration and poll books containing a list of the qualified voters of said county, being persons over twenty-one years of age residing therein.

13. That at said July 1947 meeting, the said board of county commissioners of Pitt County, in considering per-



sons now on said list, selected therefrom for jury service persons possessing the qualifications set out in the statutes aforesaid and did not reject any person on account of color or race, and that no negro was rejected on account of his race, the race to which any person belonged not being discussed, or considered, in passing upon the qualifications of said persons to act as jurors, and made a list of the names of the persons who were qualified therefor, and duly approved and adopted such as the Jury List of the county.

14. That said board of county commissioners caused the names upon the jury list adopted, as set out above, to be copies on small scrolls of paper of equal size, and put into a box procured for that purpose, having two divisions marked No. 1 and No. 2, and fastened by two locks, the key of one delivered to the Sheriff of Pitt County, and the key to the other delivered to the Chairman of the Board of County Commissioners, and the jury box delivered to the Clerk of said Board; and that the aforesaid keys and jury boxes have been constantly and continuously in the possession of the aforesaid officers since said date.

15. That upon the scrolls put into said boxes, containing the names of persons selected, as set out herein, there were no marks of identification except that indicating the residence of the juror, or township in which he resides; that there was nothing on the jury list or on the scroll to indicate whether such person was a person of the white or negro race.

16. That, at the request of the defendants, the jury boxes for the county were produced in open court; and the scrolls in Box No. 1 were produced in open court and the scrolls in Box No. 1 were examined and inspected, and that there was nothing on any scroll in said box indicating or identifying the race to which the juror, whose name appeared thereon belonged. That in Jury Box No. 1 were found twelve scrolls, eight of which were marked with red pencil marks at the end of the name of the person appearing thereon, and four scrolls with red pencil marks

through the names of persons appearing thereon; and in Jury Box No. 2 seventeen scrolls with red marks appearing at the end of the person's name thereon; and four scrolls with a red pencil mark through the names thereon with the pencil marks appearing to have been erased thereon. That in copying the list, in preparing the scrolls to put in said Jury Boxes, the said lists were made upon ordinary typewriting paper, containing two columns of names to the sheet, the name of each person thereon typewritten opposite the name of another person in the parallel column. That in checking or examining the aforesaid list the names of persons rejected were marked through with a red pencil; and that in each of these instances the red pencil mark through the name of the person rejected extended to and upon the end of the scroll containing the name of the person written opposite in the parallel column, and that said marks did not identify whether said person was a member of the negro or white race and was, and is of no significance. That the red marks on the ends of eight scrolls appearing in Jury Box No. 2, were marked by Commissioner Smith in the consideration of the jury list by the Board of County Commissioners at its meeting in July 1947. That another scroll considered by the board at that time contained the name of the mother of the Commissioner and that her name was marked through and the name of H. E. Smith, a brother of the commissioner's substituted therefor, and that said Smith was found to be qualified by said board and his name written on the scroll in pencil. That a scroll with the name "James Ray Pittman, Ayden, N. C." on it, had the address "Ayden" marked through with a pencil and the address "Greenville, N. C." substituted, said juror residing in Greenville; and that the marks on the other scrolls were corrections of the place of residence and address of the persons whose names appeared thereon. That one scroll contained the name of Mrs. Thelma P. Edwards, who afterwards married a Mr. Rouse, and the name of "Edwards" was marked through and the name of "Rouse" was written above it. That a scroll containing the name of Mrs. Wesley Harvey was

written above the name "Miss Eure", who in July 1947 lived in Ayden, and since then married a Mr. Wesley Harvey, and now lives in Greenville. That the scroll containing the name of Mrs. D. D. Manning, Ayden has "Ayden" marked through, and underneath written "Grimesland". That her correct address is Grimesland.

16. The jury boxes containing the scrolls of names of persons selected for jury duty having been produced in open court, opened, and, under supervision of the Court, inspected and examined by counsel for the defendants and the State, and the said scrolls therein bearing no symbol or means of identification indicating to which race any person whose name appeared thereon belonged, and no evidence was presented, or offered, as to what part or portion of the said scrolls were of the white or of the negro race, and no evidence of the ratio either race bore to the other race in the names on said scrolls, the Court finds that there is no exclusion of any negro from said scrolls by reason of race or color as now in the jury boxes of Pitt County.

17. That the tax list for Pitt County for the year 1946 contained names of 15,517 persons, of which 10,344 were white and 5,173 were negro tax payers. That the registration and poll books of 1946, containing a list of persons over twenty-one years of age residing in the county, who were qualified voters, contained the names of 20,065 white persons and 423 negro persons, a large majority being a duplication of names appearing in the tax lists of the county.

18. That it is admitted by the defendants and the State that the jury boxes for the county presented before the Court contained the names of approximately 10,000 persons of both the white and negro race, from the jury list adopted by the board of county commissioners of Pitt County.

19. That the United States Census for 1940 discloses that the total population of Pitt County to be 61,244 of which 32,151 belong to the white and 29,086 to the negro race, and 1 of a foreign race; and that of said persons over

twenty-one years of age 17,323 are of the white race and 13,762 are of the negro race, and 1 of another race, as appears in Table 22 of said census.

20. That a regular term of Superior Court of Pitt County was scheduled by Statute to be held, and did convene on Monday, August 30, 1948, which term of court was duly and regularly held. That twenty days prior thereto, the board of county commissioners of Pitt County caused to be produced before their board, by the clerk, the Jury Boxes of the county and to be drawn from said Jury Box, out of the partition marked No. 1 by a child of less than ten years of age, 64 scrolls, the said term of court being for the trial of criminal and civil cases. That persons whose names were inscribed upon said scrolls were drawn to serve as jurors at said term of the Superior Court, and when so drawn and the names thereon listed, the scrolls were put in Jury Box No. 2. That the persons whose names appeared on said scrolls, drawn as aforesaid, and no others, were duly summoned by the Sheriff to appear and except such as were sick, dead, or moved out of the county, did appear as a panel of jurors for the August 1948 term of said court. That the panel of jurors so drawn consisted of Mr. C. L. Bowen and 63 others, constituting the panel of jurors for said court.

21. That at the regular term of the Superior Court for Pitt County, provided by law, convened to be and was, held on Monday the 24th day of January, 1949. That twenty days prior to the convening of said court, on the 24th day of January, 1949, said Board of commissioners of Pitt County, North Carolina, caused a panel of jurors to be drawn for said term as follows: Said Board of County Commissioners caused to be produced before their board, by the clerk, the jury boxes of the county, and to be drawn from the jury Box out of the partition marked No. 1, by a child less than 10 years of age, 77 scrolls, the said term of court being for the trial of criminal and civil cases. That the persons whose names were inscribed on said scrolls were drawn to serve as jurors at said term of Superior Court, and when so drawn and the names thereon listed,



the scrolls were put in the jury box partition No. 2. That the persons whose names appeared on said scrolls as aforesaid, and no others, were duly summoned by the Sheriff to appear and did appear as a panel of jurors for the January 1949 term of said court, except such as were dead, sick or moved out of the county. That the panel of jurors so drawn consisted of Mr. L. R. Jackson and 76 others, constituting the panel of jurors for said term.

22. That the Clerk of the Board of county commissioners, within five days from the drawing of said panel of jurors for August 1948 term of Superior Court, and within five days from the drawing of the panel of jurors for the January 1949 term of Superior Court, delivered to the Sheriff of Pitt County a list of the jurors so drawn, and that the said Sheriff summoned the persons therein named, and no others, to attend as jurors at said court, except such as were dead, sick or out of the county, as provided by statute.

23. That in said drawings of the panel of jurors for the aforesaid August 1948 and January 1949 terms of this court, the scrolls containing the names of persons drawn who were dead, removed out of the County, or otherwise disqualified to serve, were discarded and destroyed and other persons drawn in their stead, as provided by General Statute 9.

24. That in the drawing of jurors since the revision of the jury list in July 1947, the drawing of scrolls out of partition marked No. 1 and putting them into partition marked No. 2, has continued, and that the scrolls in partition No. 1 have not been exhausted or all drawn therefrom.

25. That the manner and method of drawing grand jurors for the Superior Court of Pitt County is regulated by statute as set out in Chapter 812, of the laws of the General Assembly of North Carolina enacted at its session held in 1945, as follows:

2

## "Chapter 812

AN ACT TO REGULATE THE GRAND JURY  
OF PITT COUNTY.

The General Assembly of North Carolina do enact:

Sec. 1. That at the first term of court for the trial of criminal cases in Pitt County after the first day of July one thousand nine hundred and forty-five, there shall be chosen a grand jury as now provided by law, and the first nine members of said jury chosen at said term shall serve for a term of one year and the second nine members of said jury so chosen shall serve for a term of six months, and thereafter at the first term of criminal court after the first days of January and July of each year that there shall be chosen nine members of said grand jury to serve for a term of one year.

Sec. 2. That all laws and clauses of laws in conflict with the provisions of this Act are hereby repealed.

Sec. 3. That this Act shall be in force from and after its ratification.

Ratified this the 19th day of March 1945."

26. That upon the convening of the regular August 1948 term of the Superior Court of Pitt County for the trial of criminal cases, the same being the first term of said court held and convened after the first day of July 1948, the Judge presiding over that term of court directed the names of all persons who had been summoned and returned as jurors from the panel selected for said term, to be written on separate scrolls of paper, and put into a hat, and drawn out, one at a time, by a child under ten years of age, that the first nine members of the panel whose names appeared upon the scrolls drawn from the hat were selected, duly sworn and empanelled, with the nine members theretofore selected in the same manner at the January 1947 term of the said Superior Court, constituted the grand jury for said August Term 1948 of the Superior Court of Pitt County.

27. That said grand jury continued to serve until the January 1949 term of the Superior Court of Pitt County,

and at said January 1949 term of Superior Court of Pitt County, it being the first term of criminal court convened and held after the first day of January 1949, the Judge presiding over said term of Superior Court directed that the names of all persons returned as a panel of jurors drawn for said term, to be written on separate scrolls of paper and put into a hat and drawn out one at a time, by a child under ten years of age, and the first nine persons drawn consisting of Mr. L. R. Jackson and 8 others, were chosen as members of the grand jury for a term of one year, and, with the remaining 9 members theretofore chosen at the August 1948 term of said Superior Court, constitute the grand jury for the said January 1949 term of said Superior Court and terms succeeding and including the term of March 1949.

28. That there was no member of the negro race drawn on this grand jury. That there were members of the negro race whose names were in the jury box of the County when the panel from which said grand jury was chosen was drawn as aforesaid.

29. That since the jury list was revised and new scrolls put in the jury boxes of Pitt County in July 1947, a marked change has occurred in the frequency with which members of the negro race have been drawn and called upon panels for petit jury duty, and from time to time, in the drawings of panels of jurors since that date, members of the negro race have been drawn for jury duty at practically every term of the Superior Court, although no negro was drawn from the panel of jurors whereon he served, and chosen for the grand jury.

30. That in the drawing of the special venire of 150, ordered by the Court in the trial of this case to supplement the panel of regular jurors in the selection of the jury, the said panel of regular jurors having been exhausted, as set out in the order made in this case, of the 150 names drawn there were five members of the negro race; that of said five negro persons, two have died since their names were put in the jury box in 1947; and one had removed out of the county since said date, and two were summoned

and reported for duty, out of the 89 persons found and summoned by the Sheriff for service on said special venire. That of the two negro persons reporting for jury duty, one disqualified herself by disclosing that she had conscientious scruples against capital punishment, and the other negro juror was accepted, qualified and is seated upon the jury selected for the trial of this case.

31. That most all of the persons testifying with respect to the constitution of the jury in Pitt County Superior Court heretofore, testified that they had heretofore never been drawn, and one of these persons was drawn, as a member of the said special venire, from the jury box; that others testifying has been in court from time to time for only short periods, at different terms, and observed the proceedings of the court for only brief intervals. That it is a fact of common knowledge, of which the Court takes judicial notice, that the entire panel of jurors drawn for any term, is rarely, if ever, seated in the jury box in trying the case with which the court is engaged. That other persons testifying to the effect that they had not been drawn for jury service, also testified that they were following occupations which exempted them from service as jurors, as provided in Chapter 9, section 19 of the General Statutes of North Carolina, to-wit, "Ministers of the Gospel, physicians, funeral directors and embalmers."

32. That a second special venire, to supplement the panel of jurors from which to select the jurors to try this case consisted of 35 drawn from the jury box in open court in the presence of the defendants and their counsel, of whom 17 were found and served by the Sheriff and reported for duty; and amongst those was a witness, a negro, who had theretofore testified that he had never been drawn for jury duty, and promptly disqualified himself and claimed exemption because he was a funeral director and embalmer.

33. That of the second venire ordered for the selection of a jury in this case two members thereof were members of the negro race; that no person was excluded therefrom by reason of race or color.



34. THE COURT FURTHER FINDS AS A FACT that in the consideration of qualifications of person or persons selected for jury duty, and in determining whether or not the persons selected whose names were put on the jury list of Pitt County, ascertained to be and were qualified or possessed the qualifications for jurors as prescribed by the statutes of this State, there was no discussion or consideration as to whether or not the person named was a member of the white or negro race by said board of county commissioners; and that in selecting the persons qualified for jury service from the jury list adopted at its meeting in July 1947, the said Board of Commissioners did not intentionally, carelessly, negligently, unintentionally, or otherwise, exclude from the jury list, or scrolls placed in said box, the name of any person or persons by reason of race or color, and that no person was rejected because he or she was a member of the negro race. That in the selection of the grand jury, and petit jury panel, and two special venires, no member of the negro race was excluded therefrom because of race or color. That in the drawing of both special venires ordered in this case, the jury boxes for the county were produced in open court by the Clerk of the board of County Commissioners, and the scrolls containing the name of jurors were drawn therefrom in open court, under the direction of the presiding Judge in the presence of the defendants and their counsel, and were drawn from the box by the consent of counsel for the defendants, no objection thereto having been made by the defendants.

35. The burden of proof of establishing facts upon which the motions presented by the defendants are based is upon the defendants. They have not shown that any negro, who was otherwise qualified for jury service under the statutes of North Carolina, herein referred to, has been excluded for jury service by reason of race or color, and have not proved that when the Board of county commissioners for Pitt County revised the jury list and scrolls in 1947, pursuant to said statutes, said board failed in any respect to perform its full duty as prescribed by the law of this State, and have failed to show that any negro has

been excluded from jury service by reason of race or color.

36. THAT THIS COURT FINDS whatever may have been the status or condition of the jury list and scrolls in the jury boxes of Pitt County prior to 1947, since that date in the revision of said list or scrolls of said boxes made on that date, no person has been excluded therefrom because of race or color, and that the defendants in this case are not prejudiced in any respect by reason of the constitution of the jury list and scrolls as fixed at that time, or the way and manner in which said jury panels and grand jury were qualified and drawn.

37. The Court finds that the General Statutes of North Carolina 1943, Chapter 9, as amended in 1947, providing and controlling the method for the selection of jury lists and scrolls, and setting forth the qualifications of jurors drawn for service on the petit juries, grand juries and special venires, have been strictly complied with, and that there has been no exclusion of negroes from service upon such juries since July 1947, and that the panel of regular jurors for the August 1947, January 1948, August 1948, January 1949, and May 1949, terms of this court, and each of the two special venires ordered in this case, were all drawn and selected from, and the jury list and scrolls containing names of qualified jurors chosen and selected, strictly in accordance with the provisions of said statutes, and that since said July 1947, there was, has been, and is no discrimination against the negro race, and that no negro has been or is excluded therefrom on account of race or color.

38. The Court finds that the failure to draw the name of any negro from the jury box in the panel of jurors drawn for the August 1948 and January 1949 term of this court, and failure to draw from said jury panels the name of any negro for service upon the grand jury, as constituted from said jury panels, was, and is, not a continuation of any practice or exclusion of a negro on account of race theretofore existing, whatever it may have been prior to July 1947, when the jury list and scrolls were revised and newly created, and that the failure to draw the name of any

negro jurors on said jury panels, and select any negro therefrom for a grand juror, was not due to the exclusion of any negro on account of race or color from jury service.

THEREFORE, upon motion of Hon. William J. Bundy, Solicitor for the State, IT IS CONSIDERED, ORDERED AND ADJUDGED that this motion to quash the Bill of Indictment and this challenge to the array of jurors, be, and the same is hereby denied and dismissed.

Clawson, L. Williams,

Judge presiding.

To the foregoing the defendants  
object and except thereto.

EXCEPTION NO.....

## STATUTES.

## Chapter 15, General Statutes of North Carolina:

§ 15-41. *When officer may arrest without warrant.*—Every sheriff, coroner, constable, officer of police, or other officer, entrusted with the care and preservation of the public peace, who shall know or have reasonable ground to believe that any felony has been committed, or that any dangerous wound has been given, and shall have reasonable ground to believe that any particular person is guilty, and shall apprehend that such person may escape, if not immediately arrested, shall arrest him without warrant, and may summon all bystanders to aid in such arrest."

"15-42. *Sheriffs and deputies granted power to arrest felons anywhere in state.*—When a felony is committed in any county in this State, and upon the commission of the felony, the person or persons charged therewith flees or flee the county, the sheriff of the county in which the crime was committed, and/or his bonded deputy or deputies, either with or without process, is hereby given authority to pursue the person or persons so charged, whether in sight or not, and apprehend and arrest him or them anywhere in the State.

## Chapter 7, General Statutes of North Carolina:

§ 7-63. *Original jurisdiction.*—The superior Court has original jurisdiction of all civil actions whereof exclusive original jurisdiction is not given to some other court; and of all criminal actions in which the punishment may exceed a fine of fifty dollars, or imprisonment for thirty days; and of all such affrays as shall be committed within one mile of the place where, and during the time, such court is being held; and of all offenses whereof exclusive original jurisdiction is given to justices of the peace, if some justice of the peace shall not within twelve months after the commission of the offense proceed to take official cognizance thereof.

## Chapter 14, General Statutes of North Carolina:



§ 14-17. *Murder in the first and second degree defined; punishment.*—A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death. All other kinds of murder shall be deemed murder in the second degree, and shall be punished with imprisonment of not less than two nor more than thirty years in the state prison.

§ 1-279. *When appeal taken, stay of execution.*—The appeal must be taken from a judgment rendered out of term within 10 days after notice thereof, and from a judgment rendered in term within 10 days after its rendition, unless the record shows an appeal taken at the trial, which is sufficient, but execution shall not be suspended until the giving by the appellant of the undertakings hereinafter required.

§ 1-282. *Case on appeal; statement, service, and return.*—The appellant shall cause to be prepared a concise statement of the case, embodying the instructions of the judge as signed by him, if there be an exception thereto, and the request of the counsel of the parties for instructions. If there be any exceptions on account of the granting or withholding thereof, and stating separately, in articles numbered, the errors alleged. A copy of this statement shall be served on the respondent within 15 days from the entry of the appeal taken; within 10 days after such service the respondent shall return a copy with his approval or specific amendments indorsed or attached; if the case be approved by the respondent, it shall be filed with the clerk as a part of the record; if not returned with objections within the time prescribed, it shall be deemed approved: Provided, that the judge trying the case shall have the power, in the exercise of his discretion, to enlarge the time in which to serve statement of case on appeal and exceptions thereto or counter statement of case.

[fols. 172-181] IN UNITED STATES COURT OF APPEALS FOR THE  
FOURTH CIRCUIT

No. 6330

BENNIE DANIELS and LLOYD RAY DANIELS, Appellants,

versus

ROBERT A. ALLEN, Warden, Central Prison of the State of  
North Carolina, Raleigh, North Carolina, Appellee

Appeal from the United States District Court for the  
Eastern District of North Carolina, at Raleigh

OPINION—Filed November 5, 1951

(Argued October 12, 1951. Decided November 5, 1951)

Before Parker, Soper and Dobie, Circuit Judges

O. John Rogge (Rogge, Fabricant, Gordon & Goldman,  
Herman L. Taylor and Murray A. Gordon on brief) for  
Appellant, and Ralph Moody, Assistant Attorney General  
of North Carolina (Harry McMullen, Attorney General of  
North Carolina, on brief) for Appellee.

[fol. 182] PARKER, Circuit Judge:

This is an appeal from an order vacating a writ of habeas corpus and dismissing the petition for the writ. Appellants were indicted in a North Carolina state court for the crime of murder and were convicted by a jury of murder in the first degree. The jury did not recommend mercy in the case and petitioners were sentenced to death. They appealed to the state Supreme Court, which affirmed the conviction, and then applied to the Supreme Court of the United States for a writ of certiorari, which was denied. Two applications for leave to file petitions for writs of error coram nobis were filed before the Supreme Court of North Carolina and were denied by that court. After all these proceedings were had, a petition for habeas corpus was filed in the court below on grounds which had been raised before the state court in the trial of the case. A full hearing was given appellants by the

District Judge, who after finding the facts held that there was no merit in the grounds urged by appellants and also that they had not shown themselves entitled to the writ in view of the procedural history of the case. The last ground is the only one that we need consider.

This is not a case where facts alleged to invalidate action of a state court were discovered after trial, or where the defendants were without counsel to protect their rights during trial. They were represented on the trial by counsel of their own choosing, who took the place of counsel who had been earlier appointed by the court to represent them; and these counsel of their choice raised; offered evidence to support and had the trial court pass upon the very points urged in the petition for habeas corpus, viz. that Negroes were discriminated against in the selection of the grand and petit juries by which appellants had been indicted and tried and that confessions offered in evidence against appellants were [fol. 183] not voluntary. The trial court, after a full hearing, decided these questions against appellants, exceptions to the rulings were noted, and after conviction and sentence an appeal to the Supreme Court of the state was duly taken and counsel obtained from the trial judge an extension allowing 60 days for serving case on appeal. The case on appeal was not served within the 60 days allowed, but counsel attempted to serve it one day after the expiration of that period. The trial judge struck it from the record because not served within time, and appellants attempted to bring it up as a part of the record by applying to the Supreme Court of the state for a writ of certiorari, which that court denied, *State v. Daniels*, 231 N. C. 17, 56 S. E. 2d 2. In denying the writ, the Supreme Court pointed out that appellants could apply to that court for permission to file in the trial court a petition for writ of error coram nobis to raise matters extraneous to the record; and application was made for such permission, which was denied on the ground that it "did not make a prima facie showing of substance". *State v. Daniels*, 231 N. C. 341, 56 S. E. 2d 646.

After the Supreme Court of North Carolina had denied appellants' petition for certiorari and for permission to apply for the writ of error coram nobis, it affirmed the judgment and sentence of the trial court and dismissed the ap-

peal. *State v. Daniels*, 231 N. C. 509, 57 S. E. 2d 653.\* Application was thereupon made to the Supreme Court of the [fol. 184] United States to review the action of the state court, petitioners attaching to their application a full report of the proceedings of the trial court and complaining because of the selection of the jury and the admission of the confessions as well as because the case on appeal had been stricken from the record. These questions were thoroughly discussed in the briefs filed in support of the petition for certiorari; but the Supreme Court denied the writ, calling attention in its memorandum order, not only to the decision of the Supreme Court of North Carolina affirming the judgment, but also to the decisions of that court denying the petition for certiorari to bring up the case on appeal and denying permission to file petition for writ of error coram nobis. *Daniels v. North Carolina*, 339 U. S. 954.

After denial of certiorari by the Supreme Court of the United States, appellants again applied to the Supreme Court of North Carolina for permission to file a petition for writ of error coram nobis in the trial court; but this was denied on the ground that the only matter presented by the petition had been passed upon by the trial court and had been presented to the Supreme Court of the United States

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\* That the Supreme Court of North Carolina was thoroughly cognizant, at the time, of the right of Negroes accused of crime to be tried by juries in the selection of which discrimination had not been practiced against Negroes and that it was alive to its duty to enforce the right, is shown by its action in granting two new trials to one Raleigh Speller, one in 1948 and the other in 1949, because the right had not been observed in his case. See *State v. Speller*, 229 N. C. 67, 47 S. E. 2d 537; *State v. Speller*, 230 N. C. 345, 53 S. E. 2d 294. It had before it the fact that the question had been raised in this case; for the record shows that the case on appeal which had been stricken by the trial judge was attached to the application made for certiorari to bring it up as a part of the record.



in the application to that court for certiorari. The Court said:

"The petitioners now again petition this Court for leave to file a petition in the Superior Court of Pitt County for a writ of error coram nobis; and incorporate in that petition substantially matters that were presented to the Supreme Court of the United States in their petition to that Court for certiorari. On the fact of the petition it appears that these are matters fully presented to the Court upon their trial and there passed upon.

"The function and limitations of the writ of error coram nobis were called to the attention of counsel for the petitioners when the petition for certiorari to bring up the case on appeal was dismissed in this Court. [fol. 185] *State v. Daniels*, 231 N. C. 17, 56 S. E. 2d 2, supra; and again in the subsequent decision dismissing the petition for leave to file a petition for such writ in the trial court. \* \* \*

"The writ of error coram nobis is not a substitute for appeal. Under our practice permission to petition the Superior Court in which the petitioning defendant was tried is given only when the matter on which the petition is based is 'extraneous to the record.' \* \* \*

"We understand that the petition for certiorari presented to the Supreme Court of the United States comprehended all matters which might be which the petitioners may now rely."

No application for certiorari was made to the Supreme Court of the United States to review this decision.

On these facts we think that the District Judge was clearly correct in holding that appellants were not entitled to the writ of habeas corpus. The question involved is not one of exhausting state remedies as a prerequisite to the writ,\*

\* U. S. ex rel., *Auld v. Warden of New Jersey State Penitentiary*, 3 Cir. 187 F. 2d 615, upon which appellants rely, deals with the exhaustion of state remedies as a prerequisite to habeas corpus and held the exceptional circumstances there to justify proceeding without exhausting them. It nevertheless affirmed the order of the District Court denying the writ of habeas corpus.

nor of the rights of one who through lack of counsel has failed to raise constitutional questions in the trial court, but of permitting persons who have been represented by counsel and who have had the trial court pass on the identical questions that they wish to raise by habeas corpus to use that writ in lieu of an appeal to review the action of the trial court on those questions. To permit this to be done would be, not only to permit the writ of habeas corpus to be used in lieu of appeal, but to permit one of the lower federal courts to review the decisions of a state court of coordinate [401.186] jurisdiction, instead of requiring that the orderly process of appeal to the Supreme Court of the state with application to the Supreme Court of the United States for certiorari be followed. It is no answer to this to say that appellants have lost their right to have the questions which they present reviewed by the Supreme Court of the state. The right of review was provided by state practice and was lost by failure to comply with the reasonable rules of the state court, which the federal courts have no power to waive or to nullify.

It is well settled that the writ of habeas corpus may not be used in lieu of an appeal to review the action of a trial court with respect to questions there raised and passed upon. *Woolsey v. Best*, 299 U. S. 1; *Goto v. Lane*, 265 U. S. 393; *Riddle v. Dyche*, 262 U. S. 333; *Glasgow v. Moyer*, 225 U. S. 420, 428; *Sanderlin v. Smyth*, 4 Cir. 138 F. 2d 729. And the rule is not different because the appellants or their counsel have allowed the time for serving the case on appeal to elapse and thus lost the right to have the questions reviewed by appeal. *Goto v. Lane*, supra; *Riddle v. Dyche*, supra. As said in *Goto v. Lane*, supra: "If the questions presented involved the application of constitutional principles, that alone did not alter the rule. *Markuson v. Boucher*, 175 U. S. 184. And, if the petitioners permitted the time within which a review on writ of error might be obtained to elapse and thereby lost the opportunity for such a review, that gave no right to resort to habeas corpus as a substitute."

It is argued that the allegation that constitutional rights of appellants were denied in the ruling of the state trial court is sufficient, of itself, to authorize the issuance of the writ of habeas corpus by the federal district court. The

answer is that release under habeas corpus of one convicted [fol. 187] by a state court can be had only if the action of the state court may be held void; and it would be absurd to say that the judgment of a court is rendered void because of an erroneous ruling. To justify such action, there must have been such a gross violation of constitutional rights as to deny the accused the substance of a fair trial in a situation where he was not in position to protect himself because of ignorance, duress or other reason for which he should not be held responsible. As this court said in *Eury v. Huff*, 4 Cir. 141 F. 2d 554, 555, "A prisoner does not show right to release on habeas corpus merely by showing error on his trial, even though this involve a violation of constitutional right. To entitle him to release on habeas corpus there must have been such 'gross violation of constitutional right as to deny [to the prisoner] the substance of a fair trial and thus oust the court of jurisdiction to impose sentence.'"

In *Markuson v. Boucher*, 175 U. S. 184, 185, the Supreme Court laid down the rule generally applicable as follows: "We have frequently pronounced against the review by habeas corpus of the judgments of the state courts in criminal cases, because some right under the Constitution of the United States was alleged to have been denied the person convicted, and have repeatedly decided the proper remedy was by writ of error." And in *Glasgow v. Moyer*, 225 U. S. 420, 429, the Supreme Court said: "The principle of the cases is the simple one that if a court has jurisdiction of the case the writ of habeas corpus cannot be employed to re-try the issues, whether of law, constitutional or other, or of fact."

In dealing with the question, with particular reference to the broad language in *Bowen v. Johnston*, 306 U. S. 19, upon which appellants here rely, the Court of Appeals of the Ninth Circuit, speaking through the late Judge Garrecht, [fol. 188] in *Graham v. Squier*, 9 Cir. 132 F. 2d 681, 683-684, said:

"The language of the emphasized clause in the excerpt from the *Bowen* case, considered in and of itself and isolated from the text of which it is a part, might seem to indicate, as petitioner would have it, that whenever any constitutional right is infringed in a criminal trial, the accused, if he be convicted, may thereafter nullify

the judgment by bringing a habeas corpus proceeding. But taking that clause, as is obviously necessary in order to arrive at the true meaning, in conjunction with the statements of the Supreme Court contained in the very same paragraph, and which express the unvaried rule that a criminal action may be collaterally attacked on *jurisdictional* grounds alone, one sees immediately that the Supreme Court intended no more than that the writ of habeas corpus should issue only in those cases where the denial of the constitutional rights of the accused operated to prevent the trial court from acquiring jurisdiction over the person of the accused, or if jurisdiction did exist at the commencement of the trial, operated to destroy that jurisdiction at some stage during the progress thereof. That this interpretation of the Supreme Court's language is correct will appear from an examination of the sustaining authorities, which are cited in the case immediately following the clause under discussion."

In *Sandarin v. Smyth*, 4 Cir. 138 F. 2d 729, 730-731, this court examined with great care the rules to be observed by the federal courts in the troublesome and delicate matter of issuing writs of habeas corpus on the application of persons who are imprisoned under final judgments of state courts. We stated our conclusions in an opinion by a unanimous court as follows:

[fol. 189] "There has been some confusion of thought recently with regard to the right of persons imprisoned under judgments of state courts which they claim to have been obtained in violation of rights guaranteed by the Constitution of the United States to apply to the lower federal courts for release under habeas corpus. It may be useful, therefore, to summarize the rules which we understand to be applicable in such cases. They are:

"1. The writ of habeas corpus may not be used in such cases as an appeal or writ of error to review proceedings in the state court. *Woolsey v. Best* 299 U. S. 1, 57 S.Ct. 2, 81 L. Ed. 3; *Moore v. Dempsey* 261 U. S. 86, 43 S.Ct. 265, 57 L. Ed. 543; *Grant v. Richardson* 4 Cir.



129 F. 2d 105; *Jones v. Dowd* 7. Cir. 128 F. 2d 331. The Judgment of the state court is ordinarily res adjudicata, not only of those issues which were raised and determined, but also of those which might have been raised. *Woolsey v. Best*, *supra*; *Ex parte Spencer* 228 U. S. 652; 33 S.Ct. 709, 57 L. Ed. 1010; *Morton v. Henderson* 5 Cir. 123 F. 2d 48. Ordinarily, failure to raise a constitutional question during trial amounts to waiver thereof (*United States v. Brady* 4 Cir. 133 F. 2d 476, 481); and only where failure to raise the question at the trial was due to ignorance, duress or other reason for which petitioner should not be held responsible, may resort be had to habeas corpus in the federal courts, and, even in these cases, only where it is made to appear that there has been such gross violation of constitutional right as to deny to the prisoner the substance of a fair trial and thus oust the court of jurisdiction to impose sentence. *Moore v. Dempsey*, *supra*; *Frank v. Mangum* 237 U. S. 309, 331, 35 S.Ct. 582, 59 L. Ed. 969; *Cf. Valentina v. Mercer* 201 U. S. 131, 26 S.Ct. 368, 50 L.Ed. 693.

"2. The federal court should not issue the writ, even in the extraordinary cases above indicted, unless it is made appear that petitioner has no adequate remedy [fol. 190] in the state courts. If he has such remedy by habeas corpus, writ of error coram nobis or otherwise, he must pursue it, and can have the writ from the federal courts only after all state remedies have been exhausted. *Mooney v. Holohan* 294 U.S. 103, 55 S. Ct. 340, 79 L.Ed. 791, 98 A.L.R. 406; *United States ex rel. Kennedy v. Tyler* 269 U.S. 13, 46 S. Ct. 1, 70 L. Ed. 138; *Jones v. Dowd* 7 Cir. 128 F. 2d 331; *Hawk v. Olson* 8 Cir. 136 F. 2d 910, certiorari denied 317 U.S. 697, 63 S.Ct. 435, 87 L.Ed. —. Ordinarily, adjudications made by the state courts in connection with applications made to them will be binding on the federal courts; and, if the prisoner is not satisfied with state court action, his remedy, after exhausting the rights of review provided by state law, is to apply to the Supreme Court of the United States for writ of certiorari to review the state court proceedings, not to seek such review through application to a lower federal court or

judge for a writ of habeas corpus. *Urquhart v. Brown* 205 U.S. 179, 27 S.Ct. 459, 51 L. Ed. 760, and cases there cited; *Frach v. Mass* 9 Cir. 106 F. 2d 820; *United States v. Brady* 4 Cir. 133 F. 2d 476, 482.

"3. The writ of habeas corpus may be issued by a federal court or judge in cases where petitioner is imprisoned under the judgment of a state court only if it is made to appear, (1) that there has been such gross violation of constitutional right as to deny the substance of a fair trial and the prisoner has not been able to raise the question on the trial because of ignorance, duress or other reason for which he should not be held responsible, (2) that he has exhausted his remedies under state law, and (3) that no adequate remedy is available to him under state law, either because state procedure does not provide adequate corrective process or because there are exceptional circumstances, such as local prejudice or an inflamed condition of the public mind, which render it impossible [fol. 191] or unlikely for him to obtain adequate protection of his rights in the courts of the state, i.e. he is entitled to the writ in the federal courts "only when the state courts will not, or cannot, do justice". *United States ex rel. Lesse v. Hunt* 2 Cir. 117 F. 2d 30, 31; *Moore v. Dempsey*, supra."

Under the rules thus laid down, appellants are clearly not entitled to the writ. The questions which they raise have been decided against them by the state trial court and are res judicata. Having been represented by competent counsel on the trial, they cannot claim that their contentions were not properly presented or that they were unable "to raise the question on the trial because of ignorance, duress or other reason for which they should not be held responsible." They cannot say that no adequate remedy was available to them under state law, for their contentions were made and passed upon by the trial court and there were no special circumstances such as local prejudice or an inflamed condition of the public mind to indicate that the state court could not or would not do justice. That they lost their full right of review through failure to comply with the rules does not negative the

adequacy of the state remedy. Surely one convicted in a state court may not have his case reviewed by a federal district court instead of the Supreme Court of the state merely by failing to comply with the state rules relating to appeals.

It is argued that the case is one of peculiar hardship because the default in complying with the states courts rules consisted in only one day's delay. This was a matter, however, which went not to the matter of hearing but of review of the hearing. It was before the Supreme Court of the United States in the application for certiorari; and, proper respect for that court requires that we assume that, [fol. 192] if it had thought that such enforcement of the rules of court amounted to a denial of a fair hearing to men condemned to death, it would have granted certiorari either to the Supreme Court or the trial court and would have reviewed the case. The case falls squarely, we think, within what was said by the Supreme Court in *Ex parte Hawk* 321 U. S. 114, 118, as follows.\*

"Where the state courts have considered and adjudicated the merits of his contentions, and this Court has either reviewed or declined to review the state court's decision, a federal court will not ordinarily re-examine upon writ of habeas corpus the questions thus adjudicated. *Salinger v. Loisel* 265 U.S. 224, 230-32. But where resort to state court remedies has failed to afford a full and fair adjudication of the federal contentions raised, either because the state affords no remedy, see *Mooney v. Holohan*, supra, 115, or because in the particular case the remedy afforded by state law proves in practice unavailable or seriously inadequate, cf. *Moore v. Dempsey* 261 U.S. 86; *Ex parte Davis* 318 U.S. 412, a federal court should entertain his petition for habeas corpus, else he would be remediless."

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\* See also *Darr v. Burford* 339 U.S. 200; *Adkins v. Smyth* 4 Cir. 188 F. 2d 452; *Goodwin v. Smyth* 4 Cir. 181 F. 2d 498; *Stonebreaker v. Smyth* 4 Cir. 163 F. 2d 498, 499.

The citation by the Supreme Court of *Moore v. Dempsey* 261 U.S. 86, and *Ex parte Davis* 318 U.S. 412, shows what is meant by the remedy afforded by state law proving in practice unavailable or seriously inadequate. In *Moore v. Dempsey* it appeared that the accused had been hurried to conviction, without regard to their rights, by a state court under mob domination. In *Ex parte Davis*, habeas corpus was denied because applicant had not exhausted his state remedies, the court saying that it would not [fol. 193] assume that the state court would not handle the case properly. Nothing is said in either of these cases, or elsewhere, to suggest that a state remedy is to be deemed unavailable or inadequate, so as to authorize resort to the federal courts, merely because applicant has failed to comply with the reasonable rules of the state court in applying for the remedy.

It must be remembered that the lower federal courts are given no power to review state court action. They can release persons held under judgments of state courts only on a holding that such judgments are absolutely void; and judgments are not rendered void by erroneous rulings, even though such rulings involve constitutional rights. The federal courts should not hesitate to grant the writ of habeas corpus and declare void any state court judgment based on such gross violation of constitutional rights as to deny to an accused the substance of a fair trial, where because of ignorance, duress or other reason for which he is not responsible he has been unable to protect himself. On the other hand, they should not, under the guise of exercising the habeas corpus power, usurp the power which has not been granted them of reviewing the action of state trial courts of coordinate jurisdiction. As was well said by Mr. Justice Minton, then a Circuit Judge, in *United States ex rel. Feeley v. Ragen* 7 Cir. 166 F. 2d 976, 981:

"There should not be rigid formalism in habeas corpus proceedings in which courts are seeking the substance as to the violation of constitutional rights. But it must be remembered that habeas corpus is a collateral attack by the courts of federal jurisdiction invading the province of state jurisdiction. \* \* \* We should



not lose sight of the fact that the federal courts are being used to invade the sovereign jurisdiction of the [fol. 194] states, presumed to be competent to handle their own police affairs, as the Constitution recognized when the police power was left with the states. We are not superlegislatures or glorified parole boards. We as courts look only to the violation of federal constitutional rights. When we condemn a state's exercise of its jurisdiction and hold that the exercise of its powers is not in accordance with due process, we are in effect trying the states. It is state action that is on trial, and a decent regard for the coordinate powers of the two governments requires that we give due process to the state. That is the reason that in habeas corpus cases the relator must first show that he has exhausted his state remedies to open the way for the federal courts to try the state's exercise of its sovereign power. For after all, the states represent the people more intimately than the federal government.

"To redress an alleged imbalance between the state's exercise of its power and the rights of the individual, the federal courts exercise a delicate function, the importance of which points up our duty to consider that imbalance in the light of the rights of organized society through the state government, representing all the people, as against the relator and defendant. There is no room here for crusades or the fulfillment of missions. We are to hold the balance true. *Frank v. Mangum*, 237 U.S. 309, 329, 35 S.Ct. 582, 59 L. Ed. 969; *Urquhart, Sheriff v. Brown*, 205 U.S. 179, 183, 27 S.Ct. 459, 51 L. Ed. 760; *Baker v. Grice*, 169 U.S. 284, 290, 18 S.Ct. 323, 42 L. Ed. 748."

For the reasons stated the order vacating the writ of habeas corpus and dismissing the petition of appellants will be affirmed.

*Affirmed.*

[fol. 195] SOPER, Circuit Judge, dissenting:

Two illiterate Negro youths were convicted of wilful and premeditated murder after a trial by jury in the Superior Court of Pitt County, North Carolina, and

sentence of death was passed upon them on June 6, 1949. Their attorneys immediately noted an appeal to the Supreme Court of North Carolina and were allowed 60 days in which to prepare and serve a statement of the case on appeal in accordance with the local practice. The most important ground of appeal was the charge, not without factual foundation, that the jury had been chosen in a way which violated the Constitution of the United States in that persons of the colored race were deliberately excluded from the jury lists from which the trial juries of the county were selected. Negroes comprised 44.2 per cent. of the persons in Pitt County over 21 years of age; and one-third of the persons on the tax list of the county which constituted the basic source for the jury list. The literacy rate for Negroes in the county was 74.2 per cent. Nevertheless no Negro has ever served on the Pitt County grand jury; less than 2 per cent. of the jury list consists of Negroes, and less than 1 per cent. of the petit jurors have been Negroes.

It has been decided in many cases that the exclusion of Negroes from juries solely because of their race deprives a Negro defendant of the equal protection of the laws guaranteed by the 14th Amendment. See *Ross v. Texas*, 341 U.S. 918; *Shepherd v. Florida*, 341 U.S. 50; *Brunson v. North Carolina*, 333 U.S. 851. The last citation shows that the Supreme Court of the United States on March 15, 1948 reversed without opinion the judgments of the Supreme Court of North Carolina in five criminal cases from Forsyth County in that state on account of the unconstitutional exclusion of Negroes. In one of these cases, as in [fol. 196] the case at bar, a single Negro served on the county jury, but in all, the evidence showed an unconstitutional discrimination. Subsequently the Supreme Court of North Carolina reversed two consecutive judgments of the Superior Court of Bertie County in *State v. Spiller*, 229 N.C. 67, and 231 N.C. 549, for similar defects in the constitution of the jury. It is not claimed that the evidence of discriminatory exclusion of Negroes from the jury lists in Pitt County, from which the jury in the pending case was chosen, differs materially from the evidence of discrimination in the Brunson and Sperry cases where the convictions were set aside.

Unfortunately, the convicted men in the pending case have never been able to secure a review of the judgment of the trial court on the merits either in the Supreme Court of North Carolina or in the Supreme Court of the United States, because their attorneys failed to file the statement of their case on appeal within the 60 day period fixed by the court. They served their statement on the solicitor of Pitt County, the prosecuting attorney, on August 6 instead of August 5, 1949, and hence were one day late. This delay did not embarrass the prosecution in any way and might well have been waived since the solicitor was able to prepare and serve his reply within the time allowed him by the court; and hence the final disposition of the case in the Supreme Court of the State was in no way retarded by the slip of defendants' attorneys. Nevertheless the solicitor moved the court to strike the case on appeal and this motion was granted. The result was that an appeal on the merits to the Supreme Court of North Carolina was precluded, notwithstanding the repeated efforts to secure such a hearing which are described in the opinion of the court herein.

Furthermore, the Supreme Court of the United States [fol. 197] did not consider the case on its merits in passing upon the application for certiorari. Seemingly, the court adopted the course advocated by the Attorney General of the State in his brief in opposition to the application for the writ wherein he asked the court to dismiss the petition on the ground that the Supreme Court of North Carolina had not passed on the merits of the case, but had dismissed the appeal for procedural reasons only and had suggested that the appellants might pursue another method which they had failed to do. It is true that during the argument in the Supreme Court of the United States the attorneys for the petitioners handed to the court a typewritten copy of the proceedings in the trial court and asked the court to consider it; but since it was not part of the record of the Supreme Court of North Carolina, which accompanied the petition for the writ, it is probable that the Supreme Court of the United States did not consider the merits but dismissed the petition because it appeared that the Supreme Court of North Carolina had only passed on local

procedural matters, leaving other remedies open to the appellants, and had not decided any federal question. The situation is not unlike that before the Supreme Court in *White v. Ragen*, 324 U.S. 760; where it was held that if the court is unable to say that the action of a state Supreme Court, brought to its attention by petition for certiorari, was not based on an adequate non-federal ground, the petition for certiorari must be dismissed, although it sufficiently alleges violation of constitutional rights, and in such case the dismissal of the writ does not bar an application to the Federal District Court for relief based on federal rights. It would seem that the attorneys for the state in the pending case, having induced the Supreme Court of the United States to dismiss the defendants' petition for certiorari on the ground that no [fol. 198] federal rights were involved, should now be precluded from using the dismissal of the writ of certiorari by the court as ground for dismissing the pending petition of habeas corpus in the federal District Court.

There is no attempt on the part of the State of North Carolina in the pending appeal to show that there was not a gross violation of the constitutional rights of the prisoners in the trial court. The state's argument proceeds upon the ground that the appellants lost any right to a review of the action of the trial court of Pitt County when their attorneys failed to conform meticulously to the local procedural requirements. The whole case for the state rests upon the established rule that a defendant convicted of crime may not use the writ of habeas corpus in lieu of an appeal to review the action of the trial court upon questions raised and decided at the trial. But this rule, although upheld in numerous decisions, as the opinion of the court shows, has frequently been held inapplicable and unjust under varying circumstances in many cases so that it has become well nigh essential to examine the history of every case in order to determine whether the rule should be enforced. The subject is illumined by the opinion of the court and the dissenting opinions in *Sunal v. Large*, 332 U.S. 174. There the majority of the court, speaking through Justice Douglas, held that the rule should be



applied, but spoke of the exceptions in the following terms:  
(P. 179)

" \* \* Yet, on the other hand, where the error was flagrant and there was no other remedy available for its correction, relief by habeas corpus has sometimes been granted. As stated by Chief Justice Hughes in *Bowen v. Johnston*, 306 U.S. 19, 27, the rule which requires resort to appellate procedure for the correction of errors 'is not one defining power but one which relates to the appropriate exercise of power.' That [fol. 199] rule is, therefore, 'not so inflexible that it may not yield to exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent.' Id. p. 27. That case was deemed to involve 'exceptional circumstances' by reason of the fact that it indicated "a conflict between state and federal authorities on a question of law involving concerns of large importance affecting their respective jurisdictions." Id. p. 27. The court accordingly entertained the writ to examine into the jurisdiction of the court to render the judgment of conviction.

"The same course was followed in *Ex parte Hudgings*, 249 U.S. 378, where petitioner was adjudged guilty of contempt for committing perjury. The court did not require the petitioner to pursue any appellate route but issued an original writ and discharged him, holding that perjury without more was not punishable as a contempt. That situation was deemed exceptional in view of 'the nature of the case, of the relation which the question which it involves bears generally to the power and duty of courts in the performance of their functions, of the dangerous effect on the liberty of the citizen when called upon as a witness in a court which might result if the erroneous doctrine upon which the order under review was based were not promptly corrected. . . ."

See also the tentative classification of categories in the dissenting opinion of Justice Frankfurter in which habeas corpus has been entertained, and the reference therein to

the opinion of Judge Learned Hand in *U.S. ex rel. Kulick v. Kennedy*, 2 Cir. 157 F. 2d 811, 813, where he said:

"We shall not discuss at length the occasions which will justify resort to the writ, where the objection has been open on appeal. After a somewhat extensive review of the authorities twenty-four years ago, I concluded that the law was in great confusion; and the decisions since then have scarcely tended to sharpen the lines. We can find no more definite rule than that the writ is available, not only to determine points of jurisdiction, stricti juris, and constitutional questions; but whenever else resort to it is necessary to prevent a complete miscarriage of justice."

See also the opinion of Judge Chesnut speaking for this court in *Sunal v. Large*, 157 F. 2d 165, in which the exceptional circumstances justifying a departure from the general rule are discussed.

The special and unusual circumstances of the present case justify the statement that the constitutional rights of the prisoners were so clearly violated, that the judgment against them would have been reversed by the Supreme Court of North Carolina if it had felt free to entertain their appeal. So much is clear from the two reversals in *State v. Speller*, 229 N.C. 67 and 230 N.C. 345 based on the same kind of jury question as that raised in the pending case; and no one can doubt from a consideration of *Brinson v. North Carolina*, 333 U.S. 951, and numerous other decisions, that the same result would have been reached in the Supreme Court of the United States had that court reached the constitutional question involved.

It this be so, the insistence by the state upon a technical and trivial procedural step as an impassible barrier to a review of the merits of the case seems to call loudly for the intervention of the federal court. The trial court of Pitt County at two important junctures in the trial stopped the defendants when they sought to raise the jury question. During the period when they were represented by counsel appointed by the court their attorneys allowed them to plead not guilty without raising any objection to the jury

[fol. 201] list of the county, with which it may be assumed they were familiar; and later when the attorneys selected by the prisoners raised the same point before the trial, they were told that the prisoners by pleading to the indictment, had lost the opportunity to challenge the jury as of right and that the matter lay within the discretion of the court. The court exercised this discretion against the prisoners. Again when the attorneys for the prisoners were one day late in filing the statement of their case on appeal the court struck their statement of the case from the record, so that the appeal on the jury question was effectively denied.

The court's strict application of the procedural rules in a capital case in these two instances can hardly be approved as a proper exercise of judicial discretion. The defendants merely asked for rulings which would have enabled them to obtain a review by the highest court of the state of the trial court's action on a grave constitutional question; and the relief could have been granted without interfering with the enforcement of the criminal laws of the state. It can hardly be doubted that the decision in each case lay within the discretion of the judge, but once it was taken, the Supreme Court of the state deemed itself powerless to interfere. Thus there is presented an impasse which can be surmounted only by a proceeding like that before this court. We have been told time and again that legalistic requirements should be disregarded in examining applications for the writ of habeas corpus and the rules have been relaxed in cases when the trial court has acted under duress or perjured testimony has been knowingly used by the prosecution, or a plea of guilty has been obtained by trick, or the defendant has been inadequately represented by counsel. *Hawk v. Olsen*, 326 U.S. 271; *Darr v. Buford*, 339 U.S. 200, 203. It is difficult to see any material distinction in practical effect [fol. 202] between these circumstances and the plight of the prisoners in the pending case who have been caught in the technicalities of local procedure and in consequence have been denied their constitutional right.

The writ should be granted in the pending case and the prisoners remanded to the state authorities to be tried in accordance with the law of the land.

[fol. 203] UNITED STATES COURT OF APPEALS FOR THE FOURTH  
CIRCUIT

No. 6330

BENNIE DANIELS and LLOYD RAY DANIELS, Appellants,

vs.

ROBERT A. ALLEN, Warden, Central Prison of the State of  
North Carolina, Raleigh, North Carolina, Appellee.

JUDGMENT—Filed and Entered November 5, 1951

Appeal from the United States District Court for the  
Eastern District of North Carolina.

This cause came on to be heard on the record from the  
United States District Court for the Eastern District of  
North Carolina, and was argued by counsel.

On consideration whereof, it is now here ordered and  
adjudged by this Court that the order of the said District  
Court appealed from in this cause, be, and the same is  
hereby, affirmed with costs.

November 5th, 1951.

John J. Parker, Chief Judge, Fourth Circuit.

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IN UNITED STATES COURT OF APPEALS

November 29, 1951, petition of appellants for stay of  
mandate is filed.

ORDER STAYING MANDATE—Filed December 3, 1951

Upon the petition of the appellants, by their counsel, and  
for good cause shown,

It is ordered that the mandate of this Court in the above  
entitled case be, and the same is hereby, stayed pending  
the application of the said appellants in the Supreme Court  
[fol. 204] of the United States for a writ of certiorari to  
this Court, unless otherwise ordered by this or the said  
Supreme Court, provided the application for a writ of



certiorari is filed in the said Supreme Court within 30 days from this date.

Nov. 30th, 1951.

John J. Parker, Chief Judge, Fourth Circuit.

[fol. 205] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 206] SUPREME COURT OF THE UNITED STATES

No. 271, Misc. —, October Term, 1951

[Title omitted]

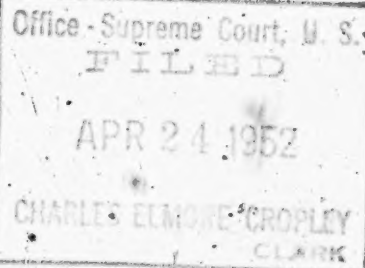
ORAL ARGUING CERTIORARI—March 3, 1952

On petition for writ of Certiorari to the United States Court of Appeals for Fourth Circuit.

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby granted. The case is transferred to the appellate docket as No. 626.

It is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

LIBRARY  
SUPREME COURT, U.S.



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. ~~670~~ 32

CLYDE BROWN,

*Petitioner,*

*vs.*

ROBERT A. ALLEN, WARDEN, CENTRAL PRISON OF THE  
STATE OF NORTH CAROLINA, RALEIGH, NORTH CAROLINA,

*Respondent*

BRIEF FOR PETITIONER

HERMAN L. TAYLOR,  
125 East Hargett Street,  
Raleigh, North Carolina.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 670

CLYDE BROWN,

*Petitioner,*

*vs.*

ROBERT A. ALLEN, WARDEN, CENTRAL PRISON OF THE  
STATE OF NORTH CAROLINA, RALEIGH, NORTH CAROLINA,

*Respondent*

**BRIEF FOR PETITIONER**

**Opinions Below**

The opinion of the United States District Court for the Eastern District of North Carolina, Raleigh Division, is reported at 98 F. Supp. 866, *sub nom. Brown v. Crawford*; <sup>1</sup> the opinion of the Court of Appeals for the Fourth Circuit is reported at 192 F. 2d 477.

**Jurisdiction**

The judgment of the Court of Appeals, affirming the order and judgment of the District Court vacating the writ of

<sup>1</sup> By order of the Court of Appeals for the Fourth Circuit dated October 13, 1951, Robert A. Allen, the successor to J. P. Crawford as Warden of Central Prison of the State of North Carolina, was substituted as appellee.

habeas corpus theretofore issued by said District Court, dismissing the petition for petitioner for such writ of habeas corpus, and remanding petitioner to the custody of Respondent, the Warden of the Central Prison of the State of North Carolina, wherein petitioner is an inmate of the death house, under sentence of death by asphyxiation, petitioner having previously been indicted, tried and convicted without recommendation of mercy in the Superior Court of Forsyth County, North Carolina, for the crime of rape, was rendered and entered on November 5, 1951 (R. 283-286). Petition for writ of certiorari from this Court to the Court of Appeals was thereafter timely made and certiorari was granted by order of this Court on March 24, 1952 (R. 287) (343 U.S. 903).

The jurisdiction of this Court is conferred by Section 1254(1) of Title 28 of the United States Code.

### **Statutes Involved**

#### **1. Section 2241, Title 28, United States Code:**

“(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

. . . . .

(c) The writ of habeas corpus shall not extend to a prisoner unless— \* \* \* (3) He is in custody in violation of the Constitution or laws or treaties of the United States.”

#### **2. Section 2254, Title 28, United States Code:**

“Any application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court shall not be granted unless it appears that

the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

### Statement of the Matter Involved

Petitioner, Clyde Brown, an illiterate Negro of about twenty years of age, was tried and convicted in the Superior Court of Forsyth County, North Carolina, of assaulting and raping a young white girl named Betty Jane Clifton. The crime was allegedly committed on the 16th day of June, 1950, and the defendant was brought before the court for trial at the September Term, 1950 of the Forsyth County Superior Court. At the time of his arraignment, and before pleading to the bill of indictment and before the selection of the jury, petitioner entered a special appearance and made a motion to quash the bill of indictment, upon the ground that the grand jury returning the indictment against the defendant was unlawfully constituted, in violation of the rights of defendant as guaranteed him under the Fifth and Fourteenth Amendments to the Constitution of the United States, in that the members of said grand jury were selected and drawn with a view and purpose of systematically limiting the representation thereon of persons of the Negro race, to which race petitioner belongs, with the result that petitioner and members of his race are unlawfully discriminated against. The issue raised by petitioner's said motion was tried upon evidence presented, and the trial judge thereafter entered an order denying said motion. Thereafter, in amplification and extension of

his motion to quash the bill of indictment, petitioner, at the termination of the trial, made a motion in arrest of judgment in which he sought to re-assert and expand the basis of his previous motion. This last motion the trial court also denied.

During the course of petitioner's trial and over his timely objection, the State was allowed to introduce into evidence statements of petitioner in the nature of confessions of commission of the alleged crime. Petitioner contended that the statements sought to be introduced as confessions were inadmissible for that they were unlawfully obtained, in violation of the guaranties of the Fourteenth Amendment to the Constitution of the United States. Upon the trial of issue thus raised, the trial court likewise overruled the petitioner's objection. Thereafter, upon trial of petitioner before a jury, he was convicted of the capital crime of rape, without recommendation of mercy, and the sentence imposed upon him was that of death by asphyxiation. This latter conviction and sentence have been upheld by the Supreme Court of North Carolina, in an opinion filed on the 2nd day of February, 1951 (*State v. Brown*, 233 N.C. 202, 63 S.E. (2d) 99).

Upon the affirmation by the Supreme Court of North Carolina of petitioner's conviction and sentence, petitioner applied to this Court for a writ of certiorari to review the decision of the Supreme Court of North Carolina, and on the 28th day of May, 1951, this Court denied petitioner's application for a writ of certiorari with the following entry:

"The petition for writ of certiorari is denied. Mr. Justice Black and Mr. Justice Douglas are of the opinion certiorari should be granted."

Subsequent to the denial of petitioner's petition for writ of certiorari by this Court, to wit, on the 21st day of June,



1951, petitioner applied to the United States District Court for the Eastern District of North Carolina, for a writ of habeas corpus, based upon Federal Constitutional grounds set out in said petition; however, on the 14th day of July, 1951, the District Court denied petitioner's petition without a hearing. Thereafter, petitioner appealed his case to the United States Court of Appeals for the Fourth Circuit, and on the 5th day of November, 1951, the said Court of Appeals for the Fourth Circuit handed down an opinion affirming the judgment of the District Court. Petitioner is presently incarcerated on death row in the State Prison of North Carolina, his execution having been stayed pending the outcome of this appeal.

| The evidence adduced by the state during petitioner's trial discloses that on Friday, June 16, 1950, at or around noon-time, one Betty Jane Clifton, a 17 year old high school student, was cruelly beaten and raped in the radio shop operated by her father, Thomas E. Clifton, on West 7th Street, in the City of Winston-Salem, North Carolina, which she was tending in absence of her father. The evidence discloses that Betty Jane Clifton was beaten about the head with a rifle butt, or some other blunt instrument; she was found in the shop in an unconscious condition and removed to a local hospital where she hovered between life and death for many days. The defendant Clyde Brown was seen in the vicinity of the radio shop close to the time of the happening of the alleged crime, and was later arrested and held for sometime for investigation in connection therewith. Various angles of his alleged connection with the crime were run down by local police officers, and after several days of detention without formal charge, petitioner allegedly confessed the commission of the crime. Upon these representations of the State, petitioner was determined by the jury's verdict to have been the perpetrator of the crime.

## Questions Involved

1. Whether the District Court committed error in arbitrarily denying petitioner's application for writ of habeas corpus without taking any evidence or permitting petitioner to be heard on the substantial Federal Constitutional questions raised in his petition, and, similarly, whether the Court of Appeals was in error in upholding said action of the District Court.

2. Whether or not the facts in evidence in petitioner's trial in the Superior Court of Forsyth County, North Carolina, show that there was unlawful discrimination against persons of the Negro race in the selection and constitution of grand juries in Forsyth County, including the grand jury which indicted petitioner solely for reason of race or color, resulting in deprivation of the equal protection of the laws guaranteed petitioner by the Fourteenth Amendment to the United States Constitution, and whether or not the alleged confessions admitted in evidence were obtained as a result of fear, duress, coercion, or other unlawful circumstances, whereby the conviction of and sentence imposed upon petitioner resulted in a deprivation of his life and liberty without due process of law, in violation of the Fourteenth Amendment to the United States Constitution.

## Specification of Error

The Court of Appeals for the Fourth Circuit erred in affirming the judgment of the District Court dismissing the petition for a writ of habeas corpus brought to secure petitioner's discharge from the custody of respondent.

## Summary of Argument

Petitioner contends that under the law, both statutory and the decisions of this Court, the District Court was in error in denying petitioner's application for writ of habeas

corpus without a hearing on the merits of his case. Petitioner further contends that the evidence in the instant case establishes that Negroes were discriminated against in the constitution of grand and petit juries in Forsyth County, North Carolina, and that the evidence establishes that the confessions admitted into evidence against him were obtained in a manner violative of the due process of law requirement of the Fourteenth Amendment to the United States Constitution.

## **Argument**

### **I**

#### **The District Court Committed Error in Denying Petitioner's Application for Writ of Habeas Corpus Without Hearing.**

Petitioner applied to the District Court on the 21st day of June, 1951, for a petition for writ of habeas corpus, based upon two substantial Federal Constitution grounds, to wit, arbitrary and unlawful exclusion of members of his race from grand juries in the County of his trial, and the unlawful use of extorted confessions to secure his conviction, upon the basis of which application a show cause order was directed to the Respondent. Respondent within the time specified by the Court made a written return to said show cause order, to which was attached documentary evidence of all proceedings theretofore had in petitioner's case which return, upon its face, raised serious issues of fact. Thereafter on the 19th day of July, 1951, the Court, without having taken any evidence or held a formal hearing at which evidence was taken, issued an order summarily denying petitioner's application. It is submitted that the action of the District Court in this connection was contrary to the provision of the statutes controlling the issuance of writs of habeas corpus by federal courts and was in conflict with the decisions of this Court on the subject.

Section 2243 of 28 U.S.C.A., dealing with the issuance of such writs, returns, hearings and decisions thereon, states, without equivocation, that:

"When the writ or order is returned *a day shall be set for hearing*, not more than five days after the return unless for good cause additional time is allowed."  
(Emphasis added.)

This statute seems without doubt to contemplate the taking of evidence and a hearing on the merits where a petition raises, as was done in the instant case, substantial federal questions as a basis for an application for the writ and where the return made to said petition raises issues of fact. It is sufficient, petitioner believes, to support his contention in this respect to refer to this Court's decision in *Walker v. Johnston*, 312 U.S. 275, 85 L.ed. 830. In the *Walker* case, this Court said:

"As we said in *Johnston v. Zerbst*, 304 US 458, 466, 82 L.ed 1461, 1467, 58 S.Ct 1019, 'Congress has expanded the rights of a petitioner for habeas corpus. . . . There being no doubt of the authority of the Congress to thus liberalize the common law procedure on habeas corpus . . . it results that under the sections cited a prisoner in custody . . . may have a judicial inquiry . . . into the very truth and substance of his detention. . . .' Such a judicial inquiry involves the reception of testimony, as the language of the statute shows." (85 L.ed., at 835.)

Compare *Palmer vs. Ashe, Warden*, 72 S. Ct. 191.

It is therefore submitted that the District Court committed error in summarily dismissing petitioner's application for writ of habeas corpus without the taking of any evidence or the holding of a hearing, and the Court of Appeals was in error in affirming said judgment.



**Petitioner has been Deprived of the Equal Protection of the Law by the Discriminatory and Arbitrary Exclusion of Negroes From (Grand and/or) Petit Juries in Forsyth County, Solely for Reason of Race, Including the Grand Jury Which Indicted and the Petit Jury which convicted Petitioner.**

There is and can be no controversy with respect to the constitutional principal herein involved, as it is one that has long been established as the fundamental law. Consequently, the only issue that usually arises in this instance is whether or not the constitutional proscription involved has been disregarded. This Court is familiar with the statutes and procedure governing the selection of grand and petit juries in the State of North Carolina. Just about two and one-half years ago this Court had occasion, in a *per curiam* opinion of one word, to reverse five convictions arising out of the State of North Carolina, on the grounds that Negroes had been systematically and arbitrarily excluded from grand and petit juries in Forsyth County, North Carolina, the very same county from which the instant proceeding comes. *Brunson v. North Carolina*, 333 U.S. 851; *Jones v. North Carolina*, *id.*; *James v. North Carolina*, *id.*; *King v. North Carolina*, *id.*; *Watkins v. North Carolina*, *id.* In each of the foregoing instances, Negroes were indicted by grand juries in Forsyth County on which there were no Negroes and under circumstances which revealed that for many years no Negroes had ever served on grand juries; also, in each instance, contrary to the instant situation, although Negroes were included on the convicting petit juries, the number of Negroes on such juries then and in the past years was disproportionately small to the number of Negroes residing in Forsyth County eligible for jury service. As has

been hereinbefore set out, the instant proceeding arises out of the same county of the State of North Carolina as the *Brunson, Jones, James and Watkins* cases, to wit, Forsyth County. It is the contention of petitioner that the situation which obtained at the time of his trial represented an attempt on the part of the jury commissioners of Forsyth County to give only token compliance to mandate of this Court as set out in the aforementioned cases; that is, instead of approaching the inclusion of qualified Negroes on grand and petit juries in Forsyth County as a matter of general and ordinary jury selection procedure, petitioner contends that the facts in evidence and the circumstances herein show that the said jury commissioners have studied and purposefully limited the number of Negroes on grand juries to no more than one or two at a given time (R. 38-39), and the number of Negroes called to serve on petit juries to no more than four or five (R. 42-44). This Court has stated, in *Cassell v. Texas*, 339 U.S. 282, 286:

"If . . . commissioners should limit proportionally the numbers of Negroes selected for grand jury service, such limitation would violate our Constitution."

And, at 287:

"Proportional racial limitation is therefore forbidden. An accused is entitled to have charges against him considered by a jury in the selection of which there has been neither inclusion nor exclusion because of race."

See also *Virginia v. Rives*, 100 U.S. 322, 323.

The United States Census for 1940 discloses that the total population of Forsyth County was, as of said census, 126,475, consisting of 41,152 Negroes and 85,323 whites, the per cent of Negroes being 32.5% of the total. This census further shows that the total number of persons in Forsyth County 21 years of age and over were 75,556, of which 25,057

are Negroes, or approximately one-third of the total. It is thus apparent from the record, and it is a fact, that the foregoing proportion of Negroes in Forsyth County has never been even remotely reflected in the proportion of Negroes who have served on juries in Forsyth County. While it is an accepted principal that proportional representation of Negroes or any other racial group on every jury is not required, *Cassell v. Texas, supra*, disproportional representation of Negroes on juries in a given community for a number of years, when considered in the light of the proportion of Negroes of the total population, is strong evidence of the violation of the rights claimed, and one would have to be unduly credulous to accept the argument that the inclusion of Negroes on jury panels in consistently and unvarying small numbers, such as one or two at a time, was solely the handiwork of chance. As this Court said in *Smith v. Texas*, 311 U.S. 128, 131:

“Chance and accident alone could hardly have brought about the listing for grand jury service of so few Negroes from among the thousands shown by the undisputed evidence to possess the legal qualifications for jury service.”

Although, the statute of the State of North Carolina (Gen. Stats. of N.C. 1943, Sec. 9-1) charges the commissioners of the several counties with the affirmative duty of resorting to the tax records of their respective counties and other sources for the purpose of fairly apprising themselves of the persons who are eligible for jury duty, the record in this case shows that the jury commissioners of Forsyth County, without further inquiry or consideration (R. 33-34, 39, 44-45), accepted as the jury panel for the period during which petitioner was indicted and tried a list of 40,000 names taken from the county tax records for the year 1948, which was tendered to them for this purpose, (R. 33-34, 44-45). At

the same time, although the commissioners admittedly knowingly failed to resort to sources other than tax records to obtain the names of persons who were qualified for jury service, although the aforementioned statute provides for the same, they sought to justify the consistent paucity of Negroes on grand and petit juries in Forsyth County upon the ground that Negroes comprise only about 16% of the taxpayers in Forsyth County (R. 39, 49). And, even if such contention be conceded, it is an accepted and a recorded fact that representation of Negroes on juries in Forsyth County has never been approximated 16% of the persons called for jury service in said County. Irrespective of the decision of the state courts on the federal right which was set up and claimed, it is the province of this Court to inquire not merely whether it was denied in express terms, but also whether it was denied in substance and effect. *Norris v. Alabama*, 294 U.S. 587, 590. Accordingly, whether a state law prescribes or does not prescribe a mode of jury selection which is designed to bring about equal protection of the laws in the administration thereof, as required by the Fourteenth Amendment, if the administrative agency which is charged with the duty of selecting juries pursues a course, either through design or ignorance, which in fact results in the arbitrary exclusion of members of a given race from such juries, an infraction of the Constitutional requirement thus results, *Neal v. Delaware*, 103 U.S. 370; *Carter v. Texas*, 177 U.S. 442.

It appears as a matter of deduction from the record that no Negro served on the trial jury which convicted petitioner (R. 27), and it further appears from the record that only one Negro was on the indicting grand jury (R. 40-41), in continuing observance of what petitioner contends is a studied and purposeful program of limiting the number of Negroes on grand and petit juries in Forsyth County. It is unquestioned that indictment and conviction of a Negro by a grand



and petit jury from which Negroes have been purposefully excluded solely for reasons of race deprives that defendant of equal protection of the laws. *Strauder v. West Virginia*, 100 U.S. 303; *Neal v. Delaware*, *supra*; *Bush v. Kentucky*, 107 U.S. 110; *Norris v. Alabama*, *supra*; *Hale v. Kentucky*, 303 U.S. 613; *Pierre v. Louisiana*, 306 U.S. 354; *Smith v. Texas*, *supra*; *Hill v. Texas*, 316 U.S. 400; *Patton v. Mississippi*, 332 U.S. 463; *Brantson et al v. North Carolina*, *supra*. Purposeful exclusion is shown even where some Negroes do serve as jurors if the proportion of Negroes on juries is infinitesimal in comparison with the proportion of Negroes in the community eligible to act as jurors. *Pierre v. Louisiana*, *supra*; *Smith v. Texas*, *supra*. The essential inquiry is not whether Negroes are proportionally represented on any one jury, but whether a historical pattern of Negro participation on juries demonstrates deliberate exclusion. *Patton v. Mississippi*, *supra*; *Akins v. Texas*, 325 U.S. 398. It is submitted, therefore that the facts in this case and the applicable law forcefully demonstrate that petitioner was denied equal protection of the laws in this instance and that the state courts committed error in denying his motion to quash the bill of indictment and the trial jury panel.

### III

#### **The Conviction of Petitioner Deprives Him of His Life and Liberty Without Due Process of Law in View of the Admission Into Evidence of His Alleged Confessions.**

The alleged assault and rape of the prosecuting witness, Betty Jane Clifton, a young high school girl, occurred on June 16, 1950. The defendant, Clyde Brown was reported by witnesses for the state to have been seen in the vicinity of the radio shop in which the incident occurred at or around the time of its alleged occurrence (R. 76 *et seq.*). The petitioner was arrested without a warrant and held for ques-

tioning in connection with the crime at or around 12:30 a.m. on the morning of June 19th (R. 87-88). The undisputed evidence is that the defendant was held in custody until the 24th day of June, 1950, before he was formally charged with the commission of the crime and was not given a preliminary hearing in connection therewith until the 7th day of July, 1950, more than 18 days after his apprehension. (R. 87 *et seq.*). It is also undisputed that during the time he was held in custody, the defendant was questioned repeatedly and persistently by police officers of the City of Winston-Salem in relays until they succeeded in obtaining from petitioner the sort of confession they desired (R. 87 *et seq.*). Although the officers contended that they warned petitioner of his rights, they made no effort to obtain counsel for petitioner until they had carried him through a searing inquisition and he had given them the incriminating statements.

General Statutes of North Carolina, 1943, Sec. 15-46 provides:

“Every person arrested without warrant shall be either immediately taken before some magistrate having jurisdiction to issue a warrant in the case, or else be committed to the county prison, and, as soon as may be, taken before such magistrate who, on proper proof, shall issue a warrant and thereon proceed to act as may be required by law.”

Although specifically enjoined so to do by the foregoing statutory provision, as has been hereinbefore set out, the officers who took petitioner into custody held him from the 19th day of June until the 24th day of June, a period of 5 days, without formally charging him with crime, and from the 19th day of June until the 7th day of July, a period of about eighteen days, before granting him a preliminary hearing (R. 89-91). It is thus apparent that during the time petitioner was continually questioned and at the time the

incriminating statements were elicited, he was being detained in violation of the laws of the State of North Carolina.

While the officers who had petitioner in custody contended that they advised him of his right, including the right to consult with counsel, it is apparent from the record, as aforesaid, that counsel was not made available to petitioner until after the incriminating statements had been made. In determining whether or not the warning allegedly given petitioner, even if it should be conceded that such a warning was given, meets the requirements of due process, it is submitted that this Court should take into consideration as a part of the circumstances the lack of intelligence on the part of the defendant as will certainly be revealed from a careful perusal on the whole record. A bald statement by officers to one of petitioner's intelligence and background in a situation of this kind that he has certain rights, knowing that he is in no position to avail himself of such rights without the affirmative help of his admonishers, it is submitted, becomes a vain and useless act. Petitioner does not contend that the incriminating statements were obtained through physical violence, but he does contend that they were induced by the coercive circumstances set out in the record, and as such are similarly inadmissible.

Since *Brown v. Mississippi*, 297 U.S. 278, it has been the undeviating practice of this Court to reverse convictions after trials in which there was admitted into evidence confessions induced by physical and mental coercion. *Chambers v. Florida*, 309 U.S. 227; *Canty v. Alabama*, 309 U.S. 629; *White v. Texas*, 309 U.S. 631; *id.*, 310 U.S. 530; *Lomax v. Texas*, 313 U.S. 544; *Vernon v. Alabama*, 313 U.S. 547; *Ward v. Texas*, 316 U.S. 547; *Ashcraft v. Tennessee*, 322 U.S. 143; *id.*, 327 U.S. 274; *Malinski v. New York*, 324 U.S. 401; *Haley v. Ohio*, 322 U.S. 596; *Lee v. Mississippi*, 322 U.S. 742; *Watts v. Indiana*, 338 U.S. 49; *Turner v. Pennsylvania*,

330 U.S. 62; *Harris v. South Carolina*, 338 U.S. 68. In view of the fact that it is apparent from the record that, aside from the alleged confessions, a conviction of petitioner would have to rest upon flimsy and doubtful circumstantial evidence, it is submitted that it is particularly appropriate for this Court to review the facts herein to determine independently whether they spell out the type and sort of coercion which the foregoing authorities have determined to be unlawful.

*Ward v. Texas*, 316 U.S. 547, 555, provides the point of departure for evaluating the undisputed and uncontradicted evidence which exists in this case, for in that case BYRNES, J., stated the applicable criteria:

"This Court has set aside convictions based upon confessions extorted from ignorant persons who have been subjected to persistent and protracted questioning, or who have been threatened with mob violence, or who have been unlawfully held incommunicado without advice of friends or counsel, or who have been taken at night to lonely and isolated places for questioning. *Anyone one of these grounds would be sufficient cause for reversal.*" (Emphasis added).

The youthful age of petitioner (*Chambers v. Florida*, *supra*; *Haley v. Ohio*, *supra*); his illiteracy (*Harris v. South Carolina*, *supra*; *White v. Texas*, *supra*); the brutality of the crime involved (*Chambers v. Florida*, *supra*; *Ward v. Texas*, *supra*); his detention without hearing or arraignment. (*Harris v. South Carolina*, *supra*; *Turner v. Pennsylvania*, *supra*; *Watts v. Indiana*, *supra*; *Haley v. Ohio*, *supra*), and without any communication with friends or counsel (*Harris v. South Carolina*, *supra*; *Ashcraft v. Tennessee*, *supra*; *White v. Texas*, *supra*; *Chambers v. Florida*, *supra*); and the harrowing questioning which led up to the alleged confessions, all combined to make those confessions tainted and constitutionally inadmissible.



It is well settled that even where proof apart from a confession in evidence might be deemed sufficient to found a conviction, although, as aforesaid, such is not the case here, such proof will not influence the necessity of reversing a judgment of conviction where the confession was involuntary or coerced. *Haley v. Ohio, supra*, at 599; *Malinski v. New York, supra*, at 404.

It is submitted, therefore, that the state courts erred in admitting said confessions in evidence.

#### IV

#### **The Writ of Habeas Corpus Should Have Issued in the Instant Case.**

For the reasons set out in Sections two and three of the argument herein, the writ of habeas corpus sought by petitioner from the District Court should have been issued by said Court.

#### **Conclusion**

Petitioner submits, therefore, that on the law and facts herein obtaining, the District Court was in error in denying his petition for writ of habeas corpus, and the Court of Appeals was in error in affirming said ruling, and that, therefore, the rulings of said courts should be reversed.

Respectfully submitted,

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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1951

32

No. 333, Misc.

CLYDE BROWN,  
PETITIONER,

v.

ROBERT A. ALLEN, WARDEN OF THE CENTRAL  
PRISON OF NORTH CAROLINA,  
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION

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---

BRIEF FOR RESPONDENT IN OPPOSITION

---

OPINIONS BELOW

The opinion of the District Court, denying petitioner's application for a writ of habeas corpus, (R.26-29) is reported at 98 F. Supp. 866. The opinion of the Court of Appeals for the Fourth Circuit, affirming the judgment of the District Court, is reported at 192 F. 2d 477.

JURISDICTION

The jurisdictional requisites are set forth in the Petition.



## QUESTIONS PRESENTED

1. Whether petitioner has the right to have retried and redetermined on the same evidence by habeas corpus in federal court the same questions of racial discrimination from the indicting grand jury and of the admissibility of his confession after they have been decided against him by the state trial court and the state supreme court, and after petition to the Supreme Court of the United States for writ of *certiorari* to review the judgment of the state supreme court has been denied.

2. Whether, where counsel for petitioner had taken full advantage of adequate remedies provided by state law to test claimed jury defect and inadmissibility of confessions as evidence, and petitioner's conviction had been affirmed by state supreme court and a writ of *certiorari* to review the decision had been denied by the United States Supreme Court, and all of this was before the court upon the return of the show-cause order, the District Court should have issued the writ, had a hearing, and taken testimony nonetheless.

## CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent provisions of the United States Constitution involved are set fourth in the Petition at page 4.

## STATEMENT OF THE CASE

The petitioner was convicted of the capital crime of rape at the September, 1950, Term of the Superior Court of Forsyth County (R. 44, Exh. No. 1, 15) and was sentenced to death by asphyxiation (R. 44, Exh. No. 1, 208-209).

Petitioner appealed to the Supreme Court of North Carolina at the Fall Term, 1950. In this appeal petitioner presented to the Supreme Court eight questions, some of which involved the same questions of law as are presented here. (R. 66, Exh. No. 5, 1-2; Br. C.C.A. 4, 2). The Supreme Court of North Carolina found no error and its opinion filed 2 February, 1951, is reported as *STATE v. BROWN*, 233 N. C. 202. The volume of official Advance Sheets of the

Court containing this opinion was filed in the hearing before the District Court as Exhibit No. 8 and appears in the record. (R. 69).

Petitioner then filed a petition with the Supreme Court of the United States for a writ of certiorari the 28th day of April, 1951, (R. 45-53) with supporting brief (R. 54-63). The State of North Carolina, respondent, filed a brief opposing the issuance of the writ (R. 68, Exh. No. 7). The Supreme Court of the United States denied the writ May 28, 1951, (R. 64).

The petitioner filed a petition in forma pauperis for a writ of habeas corpus with the District Court of the United States for the Eastern District of North Carolina on June 21, 1951, seeking release on the grounds of systematic racial discrimination from the grand jury and incompetency of the confession admitted in evidence. (R. 5-16). An order was issued the same day directed to the respondent, directing that he appear before the District Judge on the 5th day of July, 1951, and show cause why the writ of habeas corpus prayed for should not issue and make a return or answer the petition. This order also enjoined respondent from putting into execution the death sentence standing against the petitioner (R. 18).

The respondent filed answer to the petition in due time (R. 19-25). In this answer he referred to all the proceedings in the Supreme Court of North Carolina, including the opinion of said Supreme Court as officially reported in the case of *STATE v. BROWN*, 233 N. C. 202, 63 S. E. 2d 99, and all proceedings in petition to the United States Supreme Court for certiorari, and made them a part of the Answer and Further Answer as if fully copied therein and set forth, and stated that a duly authenticated copy of all proceedings in the Supreme Court of North Carolina and in the United States Supreme Court, as a result of the petitioner's appeal, would be offered in evidence by respondent on the hearing of the proceeding. (Ans. pp. 4-5; R. 22-23). This was done and at the hearing before the District Judge the following were offered in evidence, to wit:

1. The transcript of record on appeal in the Supreme

Court of North Carolina (one bound volume, Exh. No. 1, R. 44);

2. Petition to United States Supreme Court (Exh. No. 2, R. 45);
3. Attested copy of order denying petition (Exh. No. 3, R. 64);
4. Addendum to Record, Supreme Court of North Carolina (Exh. No. 4, R. 65);
5. Defendant's Brief, Supreme Court of North Carolina (Exh. No. 5, R. 66);
6. State's Brief to Supreme Court of North Carolina (Exh. No. 6, R. 67);
7. State's Brief opposing petition for writ of certiorari to the United States Supreme Court (Exh. No. 7, R. 68);
8. Advance Sheet of North Carolina Supreme Court (Exh. No. 8, R. 69).

Upon the return date specified in the show-cause order, July 5, 1951, the hearing was had and the Court reserved its opinion. Later, on July 19, 1951, the Court entered a memorandum opinion (R. 26-29), made certain findings of fact and conclusions of law (R. 30-35), and entered an order denying the writ of habeas corpus, dismissing the petition, and vacating the stay of execution. (R. 36). Whereupon, petitioner gave notice of appeal to the United States Court of Appeals for the Fourth Circuit, which notice was filed in the District Court August 6, 1951. (R. 39).

The matter was argued before the Court of Appeals for the Fourth Circuit on the 12th day of October, 1951. On the 5th day of November, 1951, the said Court of Appeals handed down an opinion affirming and sustaining the opinion and judgment of the District Court. The mandate, containing this opinion, was certified to the United States District Court for the Eastern District of North Carolina the 6th day of December, 1951. On the 20th day of December, 1951, pursuant to a petition for stay of execution of sentence and judgment in order to permit the petitioner to apply to the Supreme Court of the United States for a writ of certiorari to seek the review of said opinion of November 5, 1951, an order was entered by the District Judge

staying the execution of the sentence and judgment against the petitioner. The petition to this Court to issue a writ of certiorari to the Court of Appeals for the Fourth Circuit followed.

In the trial in the Superior Court of Forsyth County, before the selection of the jury and before pleading to the bill of indictment, counsel for petitioner entered a special appearance and moved to quash the bill of indictment upon the grounds that there had been systematic and arbitrary limitation of negro representation upon the grand jury solely on account of race. (R. 44, Exh. No. 1, 22). Evidence was taken on this motion from eight witnesses and at least two exhibits were introduced. (R. 44, Exh. No. 1, 22-49). After hearing the evidence the motion was denied and the Presiding Judge entered an order finding certain facts and making certain conclusions of law to the effect that the grand jury was in all respects lawfully constituted; that the Constitution of the United States and the Constitution of North Carolina, and the General Statutes of North Carolina, and any and all Public-Local Acts relating to the preparation of the jury list and the drawing of the grand jury for the July 3, 1950; Criminal Term of the Superior Court of Forsyth County, which was the jury that found the bill against petitioner, had in all respects been complied with. (R. 44, Exh. No. 1, 49-52).

During the trial of the case the petitioner objected to certain testimony in regard to his confession. The Judge sent the jury from the Courtroom and heard the evidence, including the statement of the petitioner with regard to the circumstances under which the confession was made. (R. 44, Exh. No. 1, 94-133). After hearing all the evidence that counsel for petitioner desired to offer, the court found as a fact that the statements were freely and voluntarily given and were competent. (R. 44, Exh. No. 1, 133).

## ARGUMENT

In his brief petitioner enumerates two specifications of error and lists three questions involved (Br. pp. 7-8). He divides his argument into the discussion of four points as follows:



- I. "THE DISTRICT COURT COMMITTED ERROR IN DENYING PETITIONER'S APPLICATION FOR WRIT OF HABEAS CORPUS WITHOUT HEARING." (Br. pp. 8-9)
- II. "PETITIONER HAS BEEN DEPRIVED OF THE EQUAL PROTECTION OF THE LAW BY THE DISCRIMINATORY AND ARBITRARY EXCLUSION OF NEGROES FROM (GRAND AND/OR) PETIT JURIES IN FORSYTH COUNTY, SOLELY FOR REASON OF RACE, INCLUDING THE GRAND JURY WHICH INDICTED AND THE PETIT JURY WHICH CONVICTED PETITIONER." (Br. pp. 9-13)
- III. "THE CONVICTION OF PETITION DEPRIVES HIM OF HIS LIFE AND LIBERTY WITHOUT DUE PROCESS OF LAW IN VIEW OF THE ADMISSION INTO EVIDENCE OF HIS ALLEGED CONFESSIONS." (Br. pp. 13-17)
- IV. "THE WRIT OF HABEAS CORPUS SHOULD HAVE ISSUED IN THE INSTANT CASE." (Br. p. 17).

In his petition he sets out two "REASONS RELIED ON FOR ALLOWANCE OF THE WRIT" (Petition pp. 5-6), to wit:

1. For reasons set out at pages 8 to 9 of the brief, the dismissal by the District Court of petitioner's application for writ of habeas corpus without hearing, and the affirmance thereof by the Court of Appeals, was in conflict with the statutory requirement (28 U.S.C.A. § 2243) and the applicable decisions of this Court. *WALKER v. JOHNSTON*, 312 US 275, 85 L. ed. 830; *PALMER v. ASHE*, 72 S. Ct. 191.
2. For reasons set out at pages 9 to 17 of the brief, (a) the denial of motion by petitioner challenging the grand jury which indicted him, was in conflict with the applicable decisions of this Court, *VIRGINIA v. RIVES*, 100 US 313, 322, et seq., (citing in all twenty cases), and (b) the admission into evidence of the alleged confessions, in view of the undisputed evidence

in the case, is also in conflict with the applicable decisions of this Court. *BROWN v. MISSISSIPPI*, 297 US 278, et seq., (citing in all fourteen cases).

A careful scrutiny discloses the fact that Point II in the brief in the instant case is identical with Point I in the brief in support of the petition to the United States Supreme Court for certiorari to the Supreme Court of North Carolina, Case 488, October Term, 1950, and the brief in this case (pp. 9-13) is identical with the brief in that case (pp. 8-12, R. 56-60). The same twenty cases are cited in both briefs and in the same order.

Likewise, Point III in the brief in the instant case is identical with Point II in the brief in Case 488, supra, and the brief (pp. 13-17) is identical with the brief in that case (pp. 12-15, R. 60-63). The same fourteen cases are cited in both briefs and in the same order.

This same identity also appears in the petition to the District Court for the writ of habeas corpus. The statement of the matter involved in the petition (R. 7-8) is identical with the statement in the petition to the United States Supreme Court in Case 488, October Term, 1950, (R. 49-50) and, except for the recital of additional procedural steps, is identical with the statement in this case, (Pet. 1-3). The first point is headed and treated the same in the petition to the District Court (Pet. 9-12) as Point I in the brief in Case 488 (Br. 8-12, R. 56-60) and the same as Point II in the brief in the instant case (pp. 9-13). The second point is headed and treated the same in the petition (Pet. 12-15) as Point II in the brief in Case 488 (Br. 12-15, R. 60-63) and the same as Point III in the brief in this case (pp. 13-17).

# I.

## THERE IS NO CONFLICT OF DECISION

1. Petitioner contends that the statute, 28 USCA § 2243, requires the District Court to issue the writ, hold a hearing and take testimony. He quotes a portion of the section. (Br. p. 9). However, another portion of the section provides:

'A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.' (Emphasis added)

In this case the District Court issued a show-cause order (R. 18). Respondent filed answer (R. 19-25), and by reference incorporated therein the ~~all~~ proceedings in the Supreme Court of North Carolina (R. 22) and upon petition to the United States Supreme Court for certiorari (R. 23). At the hearing had on the return date of the show-cause order, July 5, 1951, these court records were introduced in evidence as eight exhibits (R. 30-31). Thus, the Court was able to view the facts on which the opposing parties relied and upon these facts found that applicant was not entitled to the writ (R. 29, 35).

This procedure is authorized by the statute, 28 USCA § 2243, supra, and is approved in the opinions of this Court. *WALKER v. JOHNSTON*, 312 US 275, 85 L. ed. 830, the case cited by petitioner in support of his contention that the District Court is required to issue the writ, hold a hearing and take testimony, approves this procedure. One question presented in that case is: "(1) Was the District Court, on the filing of the petition, bound forthwith to issue the writ and have the petitioner produced in answer to it?" (p. 283). In response to this question the court says, (p. 284): "It will be observed that if, upon the face of the petition, it appears that the party is not entitled to the writ, the court may refuse to issue it. Since the allegations of such petitions are often inconclusive, the practice has grown up of issuing an order to show cause, which the respondent may answer. By this procedure the facts on which the opposing parties rely may be exhibited, and the court may find that no issue of fact is involved. In this way useless grant of the writ with consequent production of the prisoner and the witnesses may be avoided where from undisputed facts or from incontrovertible facts, such as those recited in a court record, it appears, as matter of law, no cause for granting the writ exists. . . . This practice has

*long been followed by this court and by the lower courts.* It is a convenient one, deprives the petitioner of no substantial right, if the petition and traverse are treated, as we think they should be, as together constituting the application for the writ, and the return to the rule as setting up the facts thought to warrant its denial, and if issues of fact emerging from the pleadings are tried as required by the statute." (Emphasis added).

The case of PALMER v. ASHE, Warden, 72 S. Ct. 191, 95 L. ed. 1353, 341 U. S. 919, in which the petition was granted, is a case in which, like the BRUNSON v. NORTH CAROLINA and allied cases, the petition was for a writ of certiorari to the Supreme Court of the State in which petitioner had been tried and in the courts of which he was in custody, the same sort of petition which was denied by this court in the case of BROWN v. NORTH CAROLINA, Case No. 488, October Term, 1950. Had this Court deemed the petition warranted it would have granted certiorari in May, 1951. Yet the grounds and contentions of petitioner are the same now as they were then. Clearly there is no conflict of decision with respect to Reason No. 1 relied on by petitioner.

2. Petitioner contends that the denial of his application for the writ upon (a) his challenge to the grand jury and (b) the inadmissibility of his confession was also in conflict with applicable decisions of this Court.

As hereinbefore pointed out, the contentions of petitioner and the grounds upon which he has contended he was entitled to reversal have been identical throughout his appeal to the Supreme Court of North Carolina; his petition to this Court for writ of certiorari to the Supreme Court of North Carolina, Case 488; his application for habeas corpus to the District Court; and his appeal to the United States Court of Appeals for the Fourth Circuit. And, except for the first specification of error, they are the same in this instant petition. On such showing his appeals and petitions have been consistently denied. Certainly, there is no conflict of decision.

For the convenience of the Court and to save repetition respondent's brief to the Court of Appeals for the Fourth



Circuit, Case No. 6332, is submitted herewith. In the argument in this brief, pages 7-12, respondent outlines his position in regard to these points.

## II.

### THE DECISION BELOW IS CLEARLY CORRECT.

The District Court found that the facts found by the Trial Judge, in respect to the composition of the grand jury, are supported by the evidence before him, and that the facts found by that Court in respect to the question of admission of statements made by the defendant are also supported by the evidence. (Findings of Fact and Conclusions of Law, p. 5, R. 34). He further found that the petitioner was represented by experienced and capable counsel at every stage of the proceedings in the state courts, and that petitioner and his counsel were given full and fair opportunities to present evidence and argument with respect to the two alleged violations of his constitutional rights, which were there raised and adjudicated and which he now (on petition for writ of habeas corpus to the District Court) attempts to raise again; that the remedies provided by the law of North Carolina through resort to its courts afforded to petitioner a full and fair adjudication of the federal questions raised. (Findings of Fact and Conclusions of Law p. 5, R. 34).

Upon all the findings of fact, which were based upon the petition, the answer thereto, and the exhibits filed by the respondent, (Findings of Fact and Conclusions of Law, pp. 1-6, R. 30-35) the Court concluded:

1. That the record and findings thereon present no unusual situation, and a respectful consideration for the action of the North Carolina Courts and the denial of certiorari by the Supreme Court of the United States requires that the petition for writ of habeas corpus be denied and that the petition be dismissed." (Findings of Fact and Conclusions of Law, p. 6, R. 35).

In his memorandum opinion (R. 26-29) the District Judge cited two cases of the Court of Appeals for the Fourth Circuit, to wit: *STONEBREAKER v. SMITH*,

163 F. 2d 498; and JERRY ADKINS v. W. FRANK SMITH, 188 F. 2d 452, and quoted from the second case as follows: "It would be intolerable that a federal district court should release a prisoner on habeas corpus after the state courts have refused him relief in precisely the same case on a similar writ and the United States Supreme Court has refused to review their action on certiorari. This would be, in effect, to permit a federal district court to review the Supreme Court of the United States as well as the highest court of the state." To this he added: "There appears no semblance of reason for a departure from the general rule laid down in these two cases." (Memorandum Opinion, p. 4, R. 29).

In his brief, (p. 10) petitioner lays great stress on the fact that just about two and a half years ago this court had occasion, in a per curiam opinion of one word, to reverse five convictions arising out of the State of North Carolina, on the grounds that Negroes had been systematically and arbitrarily excluded from grand and petit juries in Forsyth County, North Carolina, the very county from which the instant proceeding comes, citing BRUNSON v. NORTH CAROLINA, 333 U. S. 851, 92 L. ed. 1132; JONES v. NORTH CAROLINA, Ibid; JAMES v. NORTH CAROLINA, Ibid; KING v. NORTH CAROLINA, Ibid; and WATKINS v. NORTH CAROLINA, Ibid. Petitioner apparently contends that, since this court had reversed those five cases from Forsyth County, it should also reverse this case from Forsyth County. The attention of this court is respectfully directed, however, to the fact that these five cases were reversed March 15, 1948, upon writs of certiorari to the Supreme Court of North Carolina; that when the case of CLYDE BROWN v. NORTH CAROLINA was before this court as Case No. 488, Misc., October Term, 1950, certiorari was denied May 28, 1951. Had this court found justification for the same holding in the CLYDE BROWN case as it had in the BRUNSON and allied cases it would have reversed it or would have granted certiorari in Case No. 488, May 28, 1951. This it did not do.

Now petitioner seeks again to have this court review his trial in the State court of North Carolina and advances in

support of his contention the very same, and identical claims now that he presented before. (Compare petition for writ of certiorari to the Supreme Court of North Carolina, October Term, 1950, R. pp. 45-63; petition for writ of habeas corpus to the District Court, R. pp. 6-16; petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit, and brief in support thereof, in Case No. 333, October Term, 1951). This the respondent contends he is not entitled to.

The respondent contends that petitioner is not entitled to have retried and redetermined on the same evidence by habeas corpus in federal court the questions of racial discrimination from the indicting grand jury and of the admissibility of his confession after they have been decided against him by the State Trial Court and the State Supreme Court, and after petition to the Supreme Court of the United States for writ of certiorari to review the judgment of the State Supreme Court had been denied. And respondent respectfully contends when these facts were clearly before the District Judge for his consideration upon petition for writ of habeas corpus they presented to him the incontrovertible facts of the court records from which it appears, as matter of law, that no cause for granting the writ exists and the District Court was clearly correct in denying the writ and dismissing the petition. (R. 6-69, which included the eight exhibits).

From the above it appears clearly that the District Court had sufficient evidence before it at the hearing upon the return of the show-cause order to see from the incontrovertible facts as contained in the court record that no cause for granting the writ existed. (WALKER v. JOHNSTON, supra, p. 284). Therefore, the District Court was correct in denying the writ and the Court of Appeals was correct in affirming the judgment of the District Court.

## CONCLUSION

For the foregoing reasons is it respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1951

No. ~~670~~ 32

CLYDE BROWN,  
PETITIONER,

v.

ROBERT A. ALLEN, WARDEN OF THE CENTRAL  
PRISON OF NORTH CAROLINA,  
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT

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IN THE  
Supreme Court of the United States

OCTOBER TERM, 1951

No. 670

CLYDE BROWN,  
PETITIONER,

v.

ROBERT A. ALLEN, WARDEN OF THE CENTRAL  
PRISON OF NORTH CAROLINA,  
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the District Court denying petitioner's application for a writ of habeas corpus (R. ) is reported at 98 F. Supp. 866. The opinion of the Court of Appeals is reported at 192 F. 2d 477.

JURISDICTION

The Judgment of the Court of Appeals, affirming the order of the District Court,\* was entered November 5, 1951 (R. ). The petition for writ of certiorari was filed January 31, 1952. Certiorari was granted March 24, 1952. The jurisdiction of this Court rests on 28.U.S.C.A. 1254(1).

\*In his brief petitioner says: "The judgment of the Court of Appeals, affirming the order and judgment of the District Court *vacating the writ of habeas corpus theretofore issued by said District Court, . . .*" This is in error. The order of the District Court of July 19, 1951, reads: " . . . The petition for a writ of habeas corpus be and the same is hereby denied, . . ." (R. )

## QUESTION INVOLVED

WHETHER THE DISTRICT COURT ERRED IN NOT FORTHWITH ISSUING THE WRIT OF HABEAS CORPUS, HAVING THE PETITIONER PRODUCED BEFORE HIM IN ANSWER TO IT AND TAKING ORAL TESTIMONY AS TO THE MATTERS AND THINGS ALLEGED.

## STATUTE INVOLVED

Section 2243, Chapter 153—HABEAS CORPUS, Title 28, U.S.C.A., provides as follows:

“§ 2243. Issuance of writ; return; hearing; decision—

“A court, justice or judge entertaining an application for writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

“The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

“The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

“When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

“Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

“The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

“The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

“The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require. June 25, 1948, c. 646, 62 Stat. 965.

## STATEMENT

On the 16th day of June, 1950, Betty Jane Clifton, a young white girl who had just finished the Tenth Grade in school, was assaulted, brutally beaten and raped in her father's radio shop which she was keeping for him in his absence. She was hospitalized and remained in the hospital until August 10th (Dr. Goswick, S. R. 63). She was unconscious for a considerable part of that time and was in a semi-conscious condition for approximately a month (Dr. Goswick, S. R. 61). When assaulted she had been raped (Dr. Goswick, S. R. 62-63).

The crime was committed on Friday. On Monday, June 19th, petitioner was apprehended for questioning. He was questioned and his story was checked on Monday, Tuesday, Wednesday and Thursday. Two warrants were sworn out and served on him on Saturday, June 24th. One charged him with rape, the other with assault with a deadly weapon with intent to kill. On the 7th day of July, 1950, petitioner waived preliminary examination and was bound over to September 3, 1950, Term of the Superior Court of Forsyth County (R.     ). The Grand Jury which later found a true bill of indictment against petitioner was drawn and organized on Wednesday, July 5, 1950 (R.     ). A true bill on the indictment for rape was found by the Grand Jury September 4, 1950 (R.     ). In apt time petitioner moved to quash the bill of indictment returned by the Grand Jury. This motion was overruled in accordance with the findings of fact and order entered by the judge and he was subsequently placed on trial. The petitioner was convicted of the capital crime of rape at the September, 1950, Term of the Superior Court of Forsyth County (R.     ) and was sentenced to death by asphyxiation (R.     ).

Petitioner appealed to the Supreme Court of North Carolina at the Fall Term, 1950. In this appeal he presented to the Supreme Court eight questions, some of which involved the same questions of law as are presented here and as have been presented throughout these proceedings in the Federal Courts (R.     ); (Resp. Brief Opposing Cert. pp. 3-4). The Supreme Court of North Carolina found no error and its opinion, filed 2 February, 1951, is reported as STATE v. BROWN, 233 N. C. 202, (R. /     ).



Petitioner then filed a petition with the Supreme Court of the United States for a writ of certiorari to the Supreme Court of North Carolina 28 April, 1951, (R. . . .), with supporting brief (R. . . .). The State of North Carolina, respondent, filed a brief opposing the issuance of the writ (R. . . .). The Supreme Court of the United States denied the writ May 28, 1951, (R. . . .), 341 U. S. 943, 95 L.ed. 1369.

Petitioning in forma pauperis petitioner filed an application for a writ of habeas corpus with the District Court of the United States for the Eastern District of North Carolina on June 21, 1951, seeking release on the grounds of (a) systematic racial discrimination from the Grand Jury and (b) incompetency of the confession admitted in evidence. (R. . . .)

A show cause order was issued the same day directed to respondent's predecessor, Warden of Central Prison, directing that he appear on the 5th day of July, 1951 and show cause why the writ of habeas corpus prayed for should not issue and make a return or answer the petition. This order also stayed execution of the petitioner. (R. . . .). The respondent filed answer to the petition in due time (R. . . .). In this answer he referred to all the proceedings in the Supreme Court of North Carolina, including the opinion of said Court as officially reported, and all proceedings in the petition to the Supreme Court of the United States for writ of certiorari to the Supreme Court of North Carolina, and made all said proceedings a part of the answer and further answer as if fully copied therein and set forth. At the hearing on the return date of the show cause order, which was had in Raleigh, authenticated copies of all of the said proceedings were offered in evidence by respondent. These were introduced in evidence as Exhibits and made a part of the record, as follows:

Exhibit No. 1. The transcript of the record on appeal in the Supreme Court of North Carolina.

Exhibit No. 2. Petition to United States Supreme Court for Writ of Certiorari to the Supreme Court of North Carolina.

Exhibit No. 3. Attested copy of Order Denying Petition.

Exhibit No. 4. Addendum to Record, Supreme Court of North Carolina.

Exhibit No. 5. Defendant's Brief, Supreme Court of North Carolina.

Exhibit No. 6. State's Brief, Supreme Court of North Carolina.

Exhibit No. 7. State's Brief to Supreme Court of United States Opposing Petition for Writ of Certiorari to the Supreme Court of North Carolina.

Exhibit No. 8. Official Advance Sheet of the North Carolina Supreme Court containing opinion of STATE v. BROWN.

On July 19, 1951, the District Court made certain findings of fact and conclusions of law (R.      ), entered a memorandum opinion (R.      ), and entered an order denying the writ of habeas corpus, dismissing the petition, and vacating the stay of execution (R.      ). Whereupon, petitioner gave notice of appeal to the United States Court of Appeals for the Fourth Circuit, which notice was filed in the District Court August 6, 1951. (R.      ).

On the 5th day of November, 1951, the said Court of Appeals handed down an opinion affirming and sustaining the opinion and judgment of the District Court. (R.      ). The mandate, containing this opinion, was certified to the District Court December 6, 1951. On December 20, 1951, an order was entered by the District Judge staying execution of the sentence and judgment against the petitioner. In his petition filed January 31, 1952, petitioner applied to this Court for a writ of certiorari to the Court of Appeals for the Fourth Circuit to review the matter. Certiorari was granted March 24, 1952.

In the trial of the Superior Court of Forsyth County, upon petitioner's motion to quash the bill of indictment, evidence was taken from eight witnesses and at least two exhibits were introduced (R.      ). After hearing all the evidence offered the motion was denied and the presiding judge entered an order finding certain facts and making certain conclusions of law to the effect that the Grand Jury was in all respects lawfully constituted; that the Constitution of the United States and the Consitution of North Carolina, and the General Statutes of North Carolina, and any and all Public-Local Acts relating to the preparation of the jury lists and the drawing

of the Grand Jury for the July 3, 1950, Criminal Term of the Superior Court of Forsyth County, which was the jury that found the bill against the petitioner, had in all respects been complied with. (R.        ).

During the trial of the case the petitioner objected to certain testimony in regard to his confession. The judge sent the jury from the courtroom and heard the evidence, including the statement of petitioner himself with regard to the circumstances under which the confession was made. (R.

). After hearing all the evidence the counsel for petitioner desired to offer, the court found as a fact that the statements were freely and voluntarily given and were competent (R.    ).

## SUMMARY OF ARGUMENT

In this case the District Court issued a show-cause order (R.        ). Respondent filed answer (R.        ), and by reference incorporated therein the full proceedings in the Supreme Court of North Carolina (R.        ) and upon petition to the United States Supreme Court for Certiorari to the Supreme Court of North Carolina (R.        ). At the hearing had on the return date of the showcause order these court records were introduced in evidence as eight exhibits (R.

). Thus, the court was able to view the facts on which the opposing parties relied and upon the incontrovertible facts found that applicant was not entitled to the writ (R.        ). This procedure is authorized by statute and is approved by this Court. Therefore, the District Court committed no error in denying the petition for writ of habeas corpus and the Court of Appeals was correct in affirming the order of the District Court.

When petition was filed with this Court for writ of certiorari to the Supreme Court of North Carolina, Case No. 488. October Term, 1950, the questions involved were designated as two and they were as follows:

1. WHETHER OR NOT THERE HAS BEEN UNLAWFUL DISCRIMINATION AGAINST PERSONS OF THE NEGRO RACE IN THE SELECTION AND CONSTITUTION OF GRAND JURIES IN FORSYTH COUNTY, INCLUDING THE GRAND JURY WHICH INDICTED PETITIONER, SOLELY FOR REASON OF RACE OR COLOR, RESULTING IN DEPRIVA-

TION OF THE EQUAL PROTECTION OF THE LAWS GUARANTEED PETITIONER BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

2. WHETHER THE ALLEGED CONFESSIONS ADMITTED IN EVIDENCE WERE OBTAINED AS A RESULT OF FEAR, DURESS, COERCION, OR OTHER UNLAWFUL CIRCUMSTANCES, WHEREBY THE CONVICTION OF AND SENTENCE IMPOSED UPON PETITIONER RESULTED IN A DEPRIVATION OF HIS LIFE AND LIBERTY WITHOUT DUE PROCESS OF LAW, IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

These same question were enumerated among the eight in petitioner's appeal to the Supreme Court of North Carolina, Case No. 721, Fall Term, 1950. There they were stated as follows:

3. DID THE COURT ERR IN REFUSING TO GRANT DEFENDANT'S MOTION TO QUASH THE BILL OF INDICTMENT, WHICH SAID MOTION WAS MADE BY AND UPON SPECIAL APPEARANCE OF THE DEFENDANT BEFORE PLEADING TO SAID INDICTMENT BECAUSE THE GRAND JURY BY WHICH SAID INDICTMENT WAS RETURNED WAS UNLAWFULLY CONSTITUTED?
5. DID THE COURT COMMIT ERROR IN FINDING AS A FACT AND RULING THAT CERTAIN STATEMENTS MADE BY THE DEFENDANT, UNDER THE CIRCUMSTANCES OF THIS CASE, WERE FREELY AND VOLUNTARILY MADE, AND, THEREFORE, AMOUNTED TO AN ADMISSIBLE CONFESSION ON THE PART OF THE DEFENDANT?

In passing upon the petition for writ of habeas corpus, the District Court had before it for its consideration the full record of the proceedings, briefs, etc., of the petitioner before the Supreme Court of North Carolina, and also the petition to the Supreme Court of the United States for writ of certiorari to the Supreme Court of North Carolina and brief in support thereof. (R.       ). No new allegation of facts was made in the petition for writ of habeas corpus to the District Court from what was contained in the petition to the Supreme



Court of the United States for writ of certiorari to the Supreme Court of North Carolina (R.                   ). The arguments presented by the petitioner in support of his petition for writ of habeas corpus to the District Court are the same as the arguments in the brief to the Supreme Court of the United States in support of his petition for writ of certiorari to the Supreme Court of North Carolina (R. pp.                   ), and the citations of laws in each are identical R. pp.

). Therefore, the District Court's procedure was in the manner approved by this Court in *WALKER v. JOHNSTON*, 312 U. S. 275, 85 L. ed. 830 and the Court of Appeals was correct in finding that, "In the Brown case the petition for the writ was denied without hearing, on the basis of its procedural history. We think that dismissal in both cases was clearly right." (192 F. 2nd 477, 478.).

## ARGUMENT

### I

THE ISSUE AS TO WHETHER PERSONS OF THE NEGRO RACE WERE UNCONSTITUTIONALLY EXCLUDED FROM THE GRAND JURY WAS PASSED UPON BY THE TRIAL COURT ADVERSELY TO PETITIONER; UPON APPEAL IN WHICH THE SAME QUESTION WAS RAISED THE SUPREME COURT FOUND NO ERROR IN THE TRIAL; AND PETITION TO THE SUPREME COURT OF THE UNITED STATES FOR WRIT OF CERTIORARI TO REVIEW JUDGMENT OF THE STATE SUPREME COURT WAS DENIED. THIS ISSUE CANNOT NOW BE QUESTIONED OR RETRIED ON THE SAME EVIDENCE IN A HABEAS CORPUS PROCEEDING IN FEDERAL COURT.

In his first three questions directed to the Supreme Court of North Carolina petitioner attacks the legality of the Grand Jury which indicted him. He contends that G. S. 9-1 "imposed a mandatory duty on the jury commission of the several counties of North Carolina to do more than refer to the tax returns of the several counties in making up jury lists from which grand and petit juries were to be drawn."

The late Chief Justice Stacy, in writing the opinion for the court, met this contention squarely and answered it as follows (*STATE v. BROWN*, 233 N. C. 202, 206):

"Whatever may be the holdings in other jurisdictions, it is thoroughly settled by our decisions that the provisions of the statute now in focus are directory, and not mandatory, in the absence of proof of bad faith or corruption on the part of the officers charged with the duty of selecting the jury list. *S. v. MALLARD*, 184 N. C. 667, 114 S. E. 17, and cases there cited. Not only has no bad faith or corruption been shown on the part of the officers here, but none has so much as been suggested. *S. v. SMARR*, 121 N. C. 669, 28 S. E. 549. Hence, the motions to quash and in arrest were properly overruled. It may be added, also, that the motion in arrest was inappropriate for defendant's present purpose, as matters sought to be challenged are not apparent on the face of the record. *S. v. SAWYER*, ante, 76, 62 S. E. 2d 515; *S. v. McKNIGHT*, 196 N. C. 259, 145 S. E. 281, and cases there cited."

Wherefore, insofar as the petitioner's contention that G. S. 9-1 requires, as mandatory, the use of lists other than the tax returns in preparing jury lists for grand and petit juries is concerned, the Supreme Court of North Carolina definitely answered this contention and stated that the statute was not mandatory. This court refused to review their opinion upon petition for a writ of certiorari. Therefore, it is now the law in the case and was when the petition for habeas corpus was presented to the District Court and the petitioner had no right to raise the question by habeas corpus in the Federal District Court.

Even if petitioner could overcome this hurdle, he would be faced with the burden of alleging and proving, not conclusions or inferences, but primary facts that show, notwithstanding strong presumption of constitutional regularity in the state proceedings, that in his prosecution the state so departed from constitutional requirements as to justify a federal court's intervention to protect his constitutional rights. *LYLE v. EIDSON*, C. A. Tex. 1950, 182 F. 2d. 344. Where a prisoner seeks remedy of habeas corpus to secure his release from confinement imposed by judgment or sentence of a court, he has burden to establish essential facts entitling him to such relief as a demonstrable reality and not as a matter of speculation. *DARR v. BURFORD*, 339 U. S. 200, 94 L. ed. 761, 70 S. Ct. 587; *Re CUDDY*, 131 U. S. 280, 33 L. ed. 154, 9 S. Ct. 703; *JOHNSON v. ZERBST*, 304 U. S. 458, 468, 82 L. ed. 1461, 1468, 58 S. Ct. 1019, 146 A.L.R. 357; *WALKER*

v. JOHNSTON, 312 U. S. 275, 286, 85 L. ed. 830, 835, 61 S. Ct. 574; HAWK v. OLSON, 326 U. S. 271, 279, 90 L. ed. 61, 67, 66 S. Ct. 116.

With regard to petitioner's contention that there was racial discrimination against Negroes in the matter of jury list, note the evidence adduced and considered by the presiding judge at the trial September, 1950, Term of the Superior Court of Forsyth County. This evidence occupies 27 pages of the transcript of the record on appeal to the Supreme Court of North Carolina (Tr. pp. 22-49); the petitioner's evidence taking 17 of these pages, going from page 22 through page 39. The presiding judge's findings of fact, conclusions of law, and order denying the motion to quash the bill of indictment occupies three full pages (Tr. 49-52).

In considering this phase of the matter it is well to consider the manner in which jury lists are made up and Grand Juries are selected in North Carolina and distinguish that procedure from the procedure in some of the other states. For instance, petitioner cites the case of CASSELL v. TEXAS, 339 U. S. 282, 94 L. ed. 839, 70 S. Ct. 629, in support of his contention that the number of Negroes selected for Grand Jury service has been proportionally limited and that such limitation violates the constitution. The attention of this Court, however, is directed to the different method of selecting grand juries in Texas. For the Court's convenience there is included in the appendix, p. 49, the pertinent sections of the Texas Criminal Code relating to the selection of grand juries.

The respondent respectfully submits that the North Carolina system of selection of jurors is distinctly different and, therefore, the holding of this Court in a Texas case would not necessarily control North Carolina. In Texas grand juries are selected by jury commissions appointed by the Court. These jury commissions select 16 names to serve as grand jurors. These 16 names are placed in an envelope and delivered to the judge. At the proper time, the envelope is opened, the Clerk makes up the proper order and delivers it to the Sheriff, who summons the grand jurors to appear at the proper term of court. This method is purely a *selective* method. The procedure specified in the North Carolina Statutes provides for a certain number of jurors for each term of court to be drawn from the

box containing the jury scrolls: The statute also provides that these names are *drawn by lot*—not selected. From the number drawn and appearing at the January and July Terms of the Forsyth County Superior Court, the names of the jurors present being put into a hat, 18 jurymen are drawn by a child under 10 years of age and they constitute the grand jury. From this it may well be seen that the selection of a grand jury in North Carolina is done *by lot* rather than by selection.

Because of the method of selecting grand juries in North Carolina, it will be necessary to refer in this brief to jurors other than members of the grand jury. Therefore, although the petit jury is not questioned in this case, some of the references which follow will of necessity refer to veniremen who may have served as petit jurors as well as grand jurors.

Some of the high lights of the evidence adduced at the trial bearing on this question are as follows:

*It was agreed* between counsel for petitioner and the Solicitor, and the agreement was approved by the presiding judge, that in the selection of the trial jury there were 37 regular jurors called, of which at least 8 were members of the Negro race (21%); that there were 20 special veniremen called, of which at least 3 were members of the Negro race (15%) (Tr. 24).

*John Click*, IBM Supervisor in the office of the Tax Supervisor of Forsyth County, testified: "I furnish a list of all taxpayers in Forsyth County that are of age and residents. I make the list up once every two years and present it at the commissioners' meeting the first week in June, and that is supposed to be a list of all the taxpayers, regardless of whether they are white or colored. My cards are not separated as to white taxpayers and colored taxpayers, they are all together, white and colored, for each township in our whole county. They are alphabetically arranged. . . . That machine is able to think for itself. It takes them all. . . . When the time came to make up the list of taxpayers for Forsyth County from which I understood the jury list for the June and July meeting of the county commissioners of 1949 would come, all of my cards were commingled, irrespective of race, white or colored, and they were placed in my machine and the only distinction between any of the cards was with reference to the persons under 21 years of age and non-residents. In running those cards through the machine, there is no distinction made whatever. . . . When I presented the tax list



to the county commissioners last June, 1949, there was nothing on that tax list to indicate whether the persons who were listed there were colored or white. . . . There is nothing on the face of the slip to indicate or show whether he is white or colored, that is, on this last list that I made up.

"I did not exclude any name from the list I furnished to the county commissioners at the request of Mrs. Eunice Ayers (the Register of Deeds) and assisted her in making, because of race or color or creed. . . . I have no knowledge of what percentage of the list is white or what percentage of the list is colored.

"The list I prepared was prepared from all the taxpayers or persons listing taxes, regardless of what kind of taxes, whether it was poll tax, personal property taxes or freehold, and I put all those names on the list except the non-residents and the ones under 21 years of age. I know nothing about the law in regard to the qualifications."  
(11-24-28)

\* \* \* \* \*

Mrs. Eunice Ayers (Register of Deeds, who is by law Clerk to the Board of County Commissioners): "The list of taxpayers which Mr. Click testified is prepared every two years and handed over to the County Commissioners is presented to the County Commissioners in regular session; of course, I am present. I have nothing further to do with the list after it is presented . . . except to go ahead with the procedure of presenting them in the box when the proper time comes.

"After the names are cut apart and made of uniform size, they are placed in Box No. 1, and the jury is drawn at the regular sessions of the County Commissioners, and I am not present at the jury drawings. I am present at the June meeting and the July meeting. At the June meeting the list is presented and then the old names are taken out of the box and all the names are put into Box No. 1, the first side of the box. . . . The list from which the present grand jury was drawn was made up in June, 1949. . . . Approximately 40,000 persons or prospective jurors were concerned when I prepared the list. The pieces of paper that I handled had no indication whatsoever, that I could determine, as to whether they were white or colored. . . . The about 40,000 names on the list I have described as having been furnished to the commissioners at the June, 1949 meeting were all the names that were placed in the box. There was no name whatso-

ever excluded from that box from that list. . . . After the box was prepared for use it contained the names of all tax listers in Forsyth County, regardless of race. Those names were taken from the 1948 list, the list for the previous year." (Tr. 28-31)

\* \* \* \* \*

Nat S. Crews, County Attorney for Forsyth County: "... I was present in June when the jury list was made up, the list from which this present jury, that is serving this term of court, was drawn. . . . The minutes of the meeting, in part, reveal that . . . Mr. Click explained to the Board of Commissioners the manner in which this list was prepared by the IBM machines, and stated that in the preparation of this list there was no discrimination whatsoever as to race, color, and so forth, Mr. Click stating the following: 'The jury list which is being presented to the Board of Commissioners at the June 6, 1949, meeting was prepared from the 1948 IBM card file and represents the tax returns of Forsyth County for the year 1948. . . . The cards used in selecting the jury list which is being presented has produced a complete list of eligible persons without discrimination whatsoever, and every effort has been made to strictly comply with the provisions of Section 9, subsection 1 of the General Statutes of North Carolina as amended'." . . . "The Board of Commissioners were of the opinion and so ordered that the list be confined to the tax returns; that to use other sources of information would cause a duplication of names in the jury list and also would result in placing in the jury box many names of persons who were not qualified to serve, etc. The Board of Commissioners, upon examination of the jury list containing the tax returns of 1948 as above explained, ordered that the entire list be used so that there will be no discrimination as to persons and ordered that said list be the jury list of Forsyth County for the purposes set forth in the General Statutes of North Carolina relating to same. . . ."

"The Board of Commissioners for the county of Forsyth met July 11, 1949, . . . On page 373 of the Minutes of the Board this appears: 'The Board of Commissioners having at the June 6, 1949 meeting, . . . selected the names of persons for jury duty and ordered that said list of names constitute the jury list of Forsyth County and preserved as such, and did cause the names of said jury list to be copied on small scrolls of paper and put into a box which is used for said purposes, and did, before placing said names in said box, take therefrom all names of persons

from said box and did destroy same, . . . the names of said jurors on the new jury list, which appeared on small scrolls of paper of equal size, being placed in Division 1 of said jury box'."

"I was present at the June 5, 1950, meeting of the Board of Commissioners for the County of Forsyth. . . . On page 431 of the minutes this appears: 'A jury was drawn in accordance with the law made and provided for the following weeks of Superior Court. July 3rd, Criminal, sixty (60) names from which the Grand Jury is selected. July 10th, Criminal, forty-four (44) names. A list of the persons drawn is on file in the County Attorney's office, to which reference is hereby made. The names were drawn by a little boy who was brought to the Commissioners' meeting upon request of the Commissioners by one of the deputies sheriff. The little boy who drew the names out of the box, drawing 60 names first, and then drawing 44 names, according to the record.

" . . . The meetings take place as indicated here, in the Small Courtroom, and the jury box is opened to Division No. 1. The little boy stands on a chair or table, where he can reach it, and pulls the names out of the box. The three Commissioners sit behind two tables and they pass the names on down to my secretary, who writes the names on the jury orders. At the conclusion of the meeting the jury orders are signed by the Clerk to the Board and delivered to the Sheriff so the persons appearing thereon may be summoned for jury service. At that meeting and at that drawing there is no determination made as to the qualification of prospective jurors, to my knowledge.

"On this occasion I don't recall that there was any occasion for leaving from that list any name. There is no procedure, to my knowledge, and I am present, to systematically eliminate persons of the Negro race. I was present at that drawing. On that occasion there was no determination made as to the qualification of any name drawn by the little boy, that I know of. All of the 60 and all of the 44 names that were drawn by the little boy were listed and accepted and handed over to the Sheriff's Department for summoning, to my personal knowledge. . . . We do know that for 1948 the tax list, which is the foundation for this present Grand Jury, that the proportionate number or percentage of persons listing property for (or) polls, it is about 85% or 84% white and only 16% colored. . . . I would say that that is a pretty good

index as to the number of white persons on the tax lists and the number of colored persons, as to the percentages." (Tr. pp. 31-38)

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*Howard W. Floyd:* "I am Courtroom Clerk here. As such I was present in July, 1950, when the Grand Jury was made up for this present term of court. I supervised the drawing under His Honor's direction. I cut the names up and placed them in a hat and then a child, who was present in the Courtroom, drew the names out of the hat. The child gave me the names as they were drawn from the hat. 18 names were drawn. I called the names of the jurors out and had them come up and sit in the jury box, and they constituted the Grand Jury. The other names left in the hat were summoned as petit jurors. All the names that were drawn were white, except one, Mrs. Mary Y. Matthews.

"There was no occasion at that drawing of those names to take out any name because of being a non-resident, or deceased, or any other reason. The list was brought to me from the Sheriff's office and beside of the name was marked 'summoned' or 'not summoned' as the case may be. I did not put in the hat the names marked 'not summoned'. The names marked 'summoned' were placed in the hat, and the first 18 names coming out of the hat, drawn by the child, were the ones serving as Grand Jurors for this term. . . . A child of between 3 and 4 years of age drew those names out of the hat. The child could not read, to my knowledge. As the child drew each name out of the hat, he handed it to me; I called the name of the juror out, and that juror then became a member of the present Grand Jury, which passed on the bill of indictment in this case. No name drawn by that child was excluded from the Grand Jury, for any reason. There were only 18 names drawn, and they are the ones on the Grand Jury. There was no attempt on my part to place part of the names in one part of the hat and part in another; the names given to me on the list were thoroughly mixed up in the hat, and the first 18 names drawn from the hat then became the present Grand Jury." (Tr. 38-39)

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*Jack Gough:* "... I am Deputy Sheriff of Forsyth County, serving under Sheriff E. G. Shore. . . ."

"A list of 60 names was brought into our office by Mr. Crews' secretary after the June meeting of the County Commissioners, which was to constitute the jury list for



the July 3, 1950 Term of Court. All of the persons named on that list, that could be found, were summoned to appear at the July 3, 1950, Term of Court. I don't remember the number of persons summoned. I do recall that there were colored people, members of the Negro race, summoned for the July 3rd Term of Court; I don't know the exact number; it was four or five.

"I recall that members of the Negro race have served here as jurors in previous terms of court.

"My independent investigation revealed that for the week of January 10th, for which week 54 jurors had been drawn . . . there were five or more colored men or women on that particular week to my knowledge . . . July 4, 1949, for which week there were 60 names drawn — . . . there were six or more members of the colored race. January 9, 1950, for which week 60 names were drawn, there were five or more members of the colored race. July 3, 1950, for which week 60 names were drawn, there were four or more members of the colored race.

" . . . On June 12, 1950, from 44 names drawn there were four members of the colored race—in each case it could be more. My references are to persons of the colored race that I know and have identified positively as being of the colored race.—June 19th, out of 44 jurors drawn, there were five or more members of the colored race. July 10, 1950, out of 44 jurors, there were five or more members of the colored race. September 5th, which is our present week, out of 44 jurors there were six or more members of the colored race. September 11, 1950, which will be our term next week, out of 44 jurors there are 7 or more members of the colored race. September 18, 1950, for that week, out of 44 jurors there are 5 or more members of the colored race. . . .

" . . . I have been here four years and I have yet to see a jury in the box or sitting back in the courtroom on which there wasn't at least one member of the Negro race." (Tr. pp. 40-42)

\* \* \* \* \*

*Roy W. Craft:* " . . . I am Chairman of the Board of County Commissioners for Forsyth County, and I was serving in that capacity during June of 1949. At that time Mrs. Eunice Ayers presented to the Commissioners a list of the tax listers of Forsyth County. There was nothing on that tax list to indicate to me whether any person whose name appeared thereon was a member of the Negro or white

race. We instructed Mrs. Ayers to prepare that list by cutting the names apart in a uniform manner and presenting them at the July meeting, after scanning the list. Of course we did not take the time to read the entire 40,000 names, but we did glance through it, the Commissioners did, and we passed it on with the instructions to prepare it for our coming meeting. . . . it included all the names that appeared on the tax list, excluding non-residents and persons under the age of 21 years.

" . . . All of the names that had been presented to the Commissioners at the June meeting were placed in that box in Section No. 1. The box is right here in the courtroom. None of the names presented to the Commissioners at the June meeting was excluded from the box.

"I was present at the June 1950 meeting when the 60 names were drawn for the July 3rd Term of Court. I saw the child draw those names from the box. The child is supplied by the Sheriff's Department. It isn't always the same child, but it is usually a very young child, certainly under the age of ten, and he is placed on a chair or up on the table alongside of that tall box, so he can reach in. The child draws them out one at a time and they are passed on by the Commissioners down to Mr. Crews' secretary, who copies them on the jury list. There were no names excluded at the July 3rd meeting, to my knowledge. They were all turned over and listed on the jury list for the July 3, 1950, Term immediately after they were drawn—not two hours later, but immediately. . . . At that meeting or any other meeting, the only way I could determine whether the persons whose names are drawn are white or colored is from personal knowledge of the individual. Occasionally I know them. I don't know them all, white or colored.

"In originally placing the list in the box at the June-July meeting, 1949, there was no effort made by me or the Commissioners to either exclude or limit the number of people of the Negro race in that list. . . . That was a complete list of all the tax listers in Forsyth County for the year 1948, both white and colored, with the exception of those under 21 years of age and those known to be dead.

"At the June 1950 meeting, when the 60 names were drawn from which the present Grand Jury were taken, there were no names excluded for any reason from the names drawn by the child from that box. There was no effort made at that meeting on the part of myself or

any other member of the Board of Commissioners to limit or to exclude the name of any colored person from that jury list." (Tr. 42-45)

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Nat S. Crews (Recalled by the Court) . . . "In this county, we draw a Grand Jury the first week of the January Term, which serves for six months, and then at the July Term we draw another Grand Jury, which serves until the following January. Our grand juries serve for six months. We have a special statute for the county, enacted in 1937, which was amended in 1947 and again in 1949. . . . The present Grand Jury was selected on the 5th day of July of this year, that being the first day of the July Criminal Term, and that Grand Jury is still serving and will continue to serve until a new Grand Jury is selected in January." (Tr. 45-46)

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A careful study of the opinion of the North Carolina Supreme Court in *STATE v. BROWN*, 233 N. C. 202, should satisfy this Court that the jury question which the petitioner sought to raise by habeas corpus in the federal district court was clearly and fully passed upon and decided in the State Supreme Court. The late Chief Justice Stacy, writing the opinion for the court, says at pages 205-206:

"Putting aside any consideration of formal matters, which are not without substance, however, the only real questions sought to be presented on the appeal are: *first*, whether the jury list was selected from the legally prescribed source; and, *secondly*, whether the defendant's confession was voluntary.

"*First. The Jury List.* Prior to 1947, it was provided by G. S. 9-1 that the tax returns of the preceding year for the county should constitute the source from which the jury list should be drawn, and this was then the only prescribed source. To meet the constitutional change of the previous election making women eligible to serve on juries, the statute was amended in 1947 enlarging the source to include not only the tax returns of the preceding year but also 'a list of names of persons who do not appear upon the tax lists, who are residents of the county and over twenty-one years of age,' to be prepared in each county by the Clerk of the Board of Commissioners.

"It was made to appear on the hearing that the Com-

missioners used only the tax returns of the county for the preceding year in selecting the jury list for the September Term, 1950, Forsyth Superior Court, from which the grand jury was drawn that performed the accusation against the defendant. This circumstance, the defendant contends, resulted in discrimination against Negroes or jurors of African descent, the race to which he belongs. The conclusion, it seems to us, is far-fetched and clearly a *non sequitur*. It rests only in imagination or conjecture. The defendant must show prejudice, other than guess or surmise, before any relief could be granted on such gossamer or attenuate ground. There was no challenge to any member of the jury, grand or petit, and no suggestion that any was disqualified. Indeed, the trial court was at pains to see that every opportunity was afforded for the selection of a fair and impartial jury.

"Negroes were neither excluded nor discriminated against in the selection of either the grand or petit jury which performed in this case. One Negro woman served on the grand jury and at least one prospective Negro juror was tendered to the defendant for the petit jury and was excused or rejected by his counsel. It has been the consistent holding in this jurisdiction, certainly since the case of *S. v. PEOPLES*, 131 N. C. 784, 42 S. E. 814, that the intentional, arbitrary and systematic exclusion of any portion of the population from jury service, grand or petit, on account of race, color, creed, or national origin, is at variance with the fundamental law and cannot stand. On the other hand, it has also been the holding with us, consistent with the national authorities, *AKINS v. TEXAS*, 325 U. S. 398, 89 L. Ed. 1692, that it is not the right of any party to be tried by a jury of his own race, or to have a representative of any particular race on the jury. It is his right, however, to be tried by a competent jury from which members of his race have not been unlawfully excluded. *S. v. SPELLER*, 231 N. C. 549, 57 S. E. 2d 759; *S. v. KORITZ*, 227 N. C. 552, 43 S. E. 2d 77; *BALLARD v. U. S.*, 329 U. S. 187, 91 L. Ed. 181. No such exclusion appears here. 'The law not only guarantees the right of trial by jury, but also the right of trial by a proper jury; that is to say, a jury possessing the qualifications contemplated by law,' and in the selection of which there has been neither inclusion nor exclusion because of race. *HINTON v. HINTON*, 196 N. C. 341, 145 S. E. 615; *CASELL v. TEXAS*, 339 U. S. 282" . . .

"Finally, and in conclusion of this phase of the case, it may be said the defendant has shown no error effecting



any of his substantial rights. He has pointed out no racial discrimination in the selection of the jury list, the grand jury or the petit jury which considered the indictment against him. Nor does he specifically so contend. He only says or suggests that there might have been discrimination against his race. He concedes that neither equal nor proportional representation of race is a constitutional requisite in the selection of juries. *AKINS v. TEXAS*, supra. Indeed, proportional racial limitation is actually forbidden. *CASELL v. TEXAS*, supra. The defendant's position is one of possible discrimination, not one of racial imbalance in jury composition. A person accused of crime is entitled to have the charges against him performed by a jury in the selection of which there has been neither inclusion nor exclusion because of race. *CASELL v. TEXAS*, supra. This, the defendant has had in respect of both the grand and petit juries which performed in the case, or, at least, the contrary in respect of neither has been made to appear on the record. Hence, his claim of jury defect or irregularity in unavailing."

The United State Court of Appeals for the Fourth Circuit, upon appeal to it, said in a per curiam opinion, *BROWN v. ALLEN*, 192 F. 2d 477, 478:

"These are appeals from denials or writs of habeas corpus in cases in which appellants have been convicted of capital felonies and sentenced to death by North Carolina state courts. In both cases the questions raised in the petitions for habeas corpus had been raised and passed upon by the trial court, the action of the trial court had been affirmed by the Supreme Court of the state and the Supreme Court of the United States had denied certiorari.

*STATE v. BROWN*, 233 N. C. 202, 63 S. E. 2d 99, certiorari denied *BROWN v. STATE OF NORTH CAROLINA*, 341 U. S. 943, 95 L. Ed. 1369, 71 S. Ct. 997.

In the Brown case the petition for the writ was denied without hearing, on the basis of its procedural history. We think that dismissal in both cases was clearly right. In view of the action of the state Supreme Court upon the identical questions presented to the court below and the denial of certiorari by the Supreme Court of the United States, the cases fall squarely within the rule that 'a federal court will not ordinarily re-examine upon writ of habeas corpus the questions thus adjudicated.' *Ex parte Hawk*, 321 U. S. 114, 88 L. Ed. 572, 64 S. Ct. 448, 450; *DARR v. BURFORD*, 339 U. S. 200, 94 L. Ed. 764, 70 S. Ct. 587; *ADKINS v. SMYTH*, 4 Cir., 188 F. 2d 452;

*GOODWIN v. SMYTH*, 4 Cir. 181 F. 2d 498; *STONE-BREAKER v. SMYTH*, 4 Cir., 163 F. 2d 498, 499. As said by this court in the case last cited:

"We are confronted at the outset with the fact that the case presented by petitioner is precisely the same as that in which relief was denied by the Virginia courts and in which certiorari was denied by the Supreme Court of the United States. The rights of petitioner were fully presented in that case and the Virginia courts had full power to grant the relief asked, had they thought petitioner entitled to it. The facts were fully before the Supreme Court of the United States on certiorari; and proper respect for that court compels the conclusion that if it had thought that the record showed a denial of petitioner's constitutional rights, certiorari would have been granted and petitioner would have been afforded relief. While action of the Virginia courts and the denial of certiorari by the Supreme Court were not binding on the principle of *res judicata*, they were matters entitled to respectful consideration by the court below; and in the absence of some most unusual situation, they were sufficient reason for that court to deny a further writ of habeas corpus. It would be intolerable that a federal district court should release a prisoner on habeas corpus after the state courts have refused him relief, in precisely the same case on a similar writ and the United States Supreme Court had refused to review their action on certiorari. This would be, in effect, to permit a federal district court to review the Supreme Court of the United States as well as the highest court of the state. The rule in such cases was stated in the case of *WHITE v. RAGEN*, 324 U. S. 760, 764, 765, 65 S. Ct. 978, 981, 89 L. Ed. 1348, relied on by the court below, as follows:

"If this Court denies certiorari after a state court decision on the merits, or if it reviews the case on the merits, a federal District Court will not usually re-examine on habeas corpus the questions thus adjudicated. *Ex parte Hawk*, *supra*, 321 U. S. (114) 118, 64 S. Ct. 448, 88 L. Ed. 572."

"The citation of *Ex parte Hawk* shows what the court had in mind in the use of the words 'will not usually re-examine' in the statement just quoted; for the court had pointed out in that case the sort of cases in which the district court would be justified in granting habeas corpus notwithstanding the denial of certiorari in cases where the state court had refused to grant relief. These were

cases where resort to state court remedies had failed to afford a full and fair adjudication of the federal contentions raised either because the state afforded no remedy or because the remedy afforded proved in practice unavailable or seriously inadequate."

In his opinion, 98 F. Supp. 866, the District Court says:

"Before pleading to the indictment the petitioner moved to quash upon the ground that there had been systematic and arbitrary exclusion of Negroes solely on account of race. The Court heard evidence from the petitioner and afforded him and his counsel full and fair opportunity to substantiate the contention. Upon such evidence the trial Court ruled against petitioner and denied the motion. The evidence and conclusion of the trial court are in the record."

"Upon appeal to the Supreme Court of North Carolina, the petitioner assigned as errors both the ruling of the trial Court in overruling the motion to quash the indictment and the admission of the confessions as evidence. The Supreme Court of North Carolina upheld the conviction and affirmed the judgment, saying in its opinion: 'A person accused of crime is entitled to have the charges against him performed by a jury in the selection of which there has been neither inclusion nor exclusion because of race. This the defendant had had in both the grand and petit juries which performed in the case, or, at least, the contrary in respect to neither has been made to appear on the record. Hence, his claim of jury defect or irregularity is unavailing;'

"A petition for writ of certiorari was then filed in the United States Supreme Court, assigning as ground the two alleged errors presented to the Supreme Court of North Carolina, and on May 28, 1951, this petition was denied by order containing this notation: 'Mr. Justice Black and Mr. Justice Douglas are of the opinion that certiorari should be granted.'

"It is not asserted or even suggested by the petitioner that adequate remedies are not provided by North Carolina law to correct the wrongs about which he now complains; in fact, it must be admitted that such remedies existed and that he and his counsel took full advantage of them. It cannot be maintained, in fact, it is not alleged, that petitioner was in any way or to any extent limited or restricted in his resort to such remedies. No one, upon the record, would conclude that the action of

the State Courts in deciding the questions now raised was indifferently or lightly considered. The decision in each instance was reached after painstaking and careful procedure in accordance with law and practice and only after petitioner had had his full say. *The petitioner has had his day in Court and his present positions have been rejected by a Court which had and did not lose jurisdiction and on a record which seems to demonstrate that petitioner was given a fair and impartial trial, in which he was accorded all rights guaranteed to him by the federal Constitution and dictated by the principles of justice. In addition, the Supreme Court of the United States has refused to review such action of the State Court.* The record does not present any unusual situation which would justify the issue of the writ and, therefore, the petition for such writ has been denied."

## II.

THE CONSTITUTIONAL ISSUE AS TO WHETHER PETITIONER'S CONFESSIONS WERE INVOLUNTARY OR EXTORTED BY VIOLENCE, DURESS, OR PROMISE OF REWARD, HAVING BEEN HEARD AND DETERMINED ADVERSELY TO PETITIONER IN THE STATE TRIAL COURT, UPON APPEAL IN THE STATE SUPREME COURT, AND PETITION TO THE SUPREME COURT OF THE UNITED STATES FOR WRIT OF CERTIORARI TO REVIEW JUDGMENT OF THE STATE SUPREME COURT HAVING BEEN DENIED, THE ISSUE CANNOT NOW BE QUESTIONED OR RETRIED ON THE SAME EVIDENCE IN A HABEAS CORPUS PROCEEDING IN FEDERAL COURT.

The great weight of authority supports the view that on a habeas corpus hearing, the admission in evidence of confessions is not a matter that can be tried again on such a hearing. On habeas corpus hearings, the admission or rejection of confessions are looked upon as matters of evidence to be ruled upon by the trial Court, and the trial Court does not lose jurisdiction even though it should make an erroneous ruling thereon. This principle is upheld by many cases, both in the Supreme Court of the United States and in the various



Circuit Courts of Appeal. We now cite some of these cases, as follows:

COLLINS v. McDONALD, 258 U. S. 416, 66 L.ed. 692

EAGLES v. U. S., 329 U. S. 304, 91 L.ed. 308, 315

SCHRAMM v. BRADY, 4 Cir., 129 Fed. (2d) 109

MILLER v. HIATT, 3 Cir., 141 Fed. (2d) 691

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(Affirmed) 3 Cir., 174 Fed. (2d) 480

PERRY v. HIATT, D.C. App. 33 Fed. Supp. 1023

BURROUGHS v. SANFORD, D.C. Ga., 52 Fed. Supp. 919

WALLACE v. HUNTER, 10 Cir., 149 Fed. (2d) 59

SEDORKO v. HUDSPETH, 10 Cir., 109 Fed. (2d) 475

SMITH v. LAWRENCE, 5 Cir., 128 Fed. (2d) 822

In the case of COLLINS v. McDONALD, 258 U. S. 416, 66 L.ed. 692, the Court said:

"It is also charged that there was no evidence of guilt before the court-martial other than the confession of the accused, which, it is averred, was made, under oath, to and at the instance of his superior officer, under duress, whereby it is alleged he was compelled to become a witness against himself, in violation of the Constitution of the United States. This, in substance, is a conclusion of the pleader, unsupported by any reference to the record, and, at most, was an error in the admission of testimony, which cannot be reviewed in a habeas corpus proceeding. Cases, *supra*."

In the case of EAGLES v. U. S., 329 U.S. 304, 91 L.ed. 308, 315, the Court said:

"But it is not enough to show that the decision was

wrong, *United States ex rel. Tisi v. Tod*, 264 US 131, 68 L.ed. 590, 44 S Ct. 260, *supra*, or that incompetent evidence was admitted and considered. *United States ex rel. Vajtauer v. Commissioner of Immigration*, 273 US 103, 71 L ed 560, 47 S Ct 302. If it cannot be said that there were procedural irregularities of such a nature or magnitude as to render the hearing unfair, *Bridges v. Wixon*, *supra* (326 US p 156, 89 L ed 2116, 75 S Ct 1443), or that there was no evidence to support the order, *United States ex rel. Vajtauer v. Commissioner (US) supra*, the inquiry is at an end."

In the case of *SCHRAMM v. BRADY*, 4 Cir., 129 Fed. (2d) 109, the Court said:

"Nor can the writ of habeas corpus be used to review alleged error of the state court in admitting evidence of a confession, for habeas corpus cannot be used as a writ of error."

In the case of *U. S. v. LOWREY*, D.C., Pa., 84 Fed. Supp. 804, the Court said:

"The proceedings under 28 U.S.C.A. § 2255, being taken in the sentencing court in lieu of a writ of habeas corpus, the general principles applicable to habeas corpus apply. Consequently, the contention that the confession was secured under circumstances rendering it inadmissible presents a question of admissibility of evidence which was an appropriate matter for an appeal, and hence not subject to review by habeas corpus."

In the case of *BURALL v. JOHNSON*, 9 Cir., 134 F. (2d) 614, the Court said:

"The time to inquire into the circumstances of the confession was during the progress of the trial, and error committed, if any, was subject to correction on appeal."

In the case of *SEDORRO v. HUDSPETH*, 10 Cir., 109 Fed. (2d) 475, the Court said:

"Petitioner further complains that his immunity to self-incrimination was violated by securing from him a written confession. He charges in his petition for the writ that he was coerced into the signing of this confession and that it was secured from him under moral and physical compulsion. It is expressly stated in two separate affidavits of the special agents of the Department of Justice, who obtained the confession, that petitioner was ad-

vised in advance that he did not have to furnish any information concerning the robbery or the loot or its disposition, and that if he did, such information might be used against him in the court proceedings; \* \* \*

"The finding of the trial court that petitioner voluntarily signed the confession is amply sustained."

Respondent believes that the law applicable on this appeal in this respect is expressed in *BIRD v. SMITH*, CCA Wash.; 1949, 175 F. 2d 260, thus: "Where contention that confession is involuntary is decided against defendant by state trial and supreme courts, and the same evidence is relied on in petition to United States Supreme Court for writ of certiorari, which is denied, District Court is not entitled to consider application for writ of habeas corpus on same evidence and where petition for the writ is dismissed, a further petition for a certificate of probable cause of appeal will be denied."

Like the question of jury discrimination, the question of the appellant's (then defendant's) confession was presented to the Supreme Court of North Carolina. In writing the opinion for the court the late Chief Justice Stacy said with regard to the confession, *S. v. BROWN*, supra, at page 206:

"The only basis of challenge to the competency of defendant's confession is that he was under arrest, being held without warrant, and was in custody at the time it was given. These circumstances, taken singly or all together, unless they amounted to coercion, were not sufficient in and of themselves to render a confession, otherwise voluntary, involuntary as a matter of law and incompetent as evidence. *S. v. STEFANOFF*, 206 N.C. 443, 174 S.E. 411; *S. v. GRAY*, 192 N.C. 594, 135 S.E. 535; *S. v. THOMPSON*, 224 N.C. 601, 32 S.E. 2d 24; *S. v. LITTERAL*, 227 N.C. 527, 43 S.E. 2d 84; *S. v. SPELLER*, 230 N.C. 345, 53 S.E. 2d 294; *S. v. BROWN*, 231 N.C. 152, 56 S.E. 2d 441.

"After a preliminary investigation, pursuant to the procedure outlined in *S. v. WHITENER*, 191 N.C. 659, 132 S.E. 603, the trial court ruled the confession to be voluntary, and permitted the solicitor to offer it in evidence against the prisoner. *S. v. GRASS*, 223 N.C. 31, 25 S.E. 2d 493; *S. v. HAMMOND*, 229 N.C. 108, 47 S.E. 2d 704. The ruling is fully supported by the evidence, as witness especially the following questions propounded by the court and the answers of the defendant:

'Q. Clyde, let me ask you a question. From the time you were put in custody on the 19th of June, up until after Mr. Price was employed, came over there to the jail to see you, after you made all the statements you made in this case, were you ever mistreated in any manner by these officers, any of the officers? A. No.

'Q. Was any violence used or threatened to be used against you? A. No sir.

'Q. Did anybody hit you or threaten to hit you? A. No sir.

'Q. Did anybody threaten to do you any physical injury of any kind? A. No sir.

'Q. Did anybody offer you any reward or hope of reward to make any statement? A. No sir.

'Q. Did anybody tell you that you'd get out lighter, they'd try to help you get out lighter if you'd make a statement? A. No.

'Q. And were you, at different times—at least on two occasions, I believe you said—warned that you did not have to make a statement? A. Yes sir.

'Q. You were warned at least once before you made this final statement? Is that correct? A. Yes sir.

'Q. At that time you were told that any statements which you might make would be used against you? A. Yes sir.

"It is well understood that a free and voluntary confession is admissible in evidence against the one making it, because it is presumed to flow from a strong sense of guilt or from a love of the truth, both of which are, at times, compelling motives and powerful aids in the investigation of crimes. Just the reverse is true, however, in the case of an involuntary confession, since a statement wrung from the mind by the flattery of hope or by the torture of fear, comes in such questionable manner as to afford no assurance of its verity, and merits no consideration. *S. v. ANDERSON*, 208 N. C. 771, 182 S. E. 643; *S. v. PATRICK*, 48 N. C. 443. A confession is voluntary in law when—and only when—it was in fact voluntarily made. *S. v. JONES*, 203 N. C. 374, 166 S. E. 163; *ZIANG SUNG WAN v. UNITED STATES*, 266 U. S. 1, 69 L. Ed. 131."

And at page 208: "The court's ruling on the voluntariness of the confession is supported by the defendant's own testimony given on the preliminary inquiry. The contentions of error in its admission are without force or substance."



The same contentions were argued in the petitioner's brief in support of petition for writ of certiorari to the Supreme Court of the United States, October Term, 1950. (R. 55, 60-63).

In the case of *STATE v. WHITENER*, 191 N. C. 659, referred to above, Chief Justice Stacy says *inter alia*:

"To the introduction of this evidence (a confession) the accused, through his counsel, objected, on the ground that the confession was not given voluntarily; and the prisoner asked that the jury be withdrawn from the court room, to the end that he might interrogate the State's witnesses before the court on the preliminary question as to the competency of such proposed evidence. The jury was excused, and on cross-examination by counsel for the prisoner, the witnesses for the State testified that the confession was made voluntarily, after the prisoner had been informed of his rights, and that no inducements whatever were held out to him which caused him to make it.

"For the purpose of denying this evidence touching the voluntariness of his confession, the prisoner, through his counsel, asked that he be allowed to take the stand, not before the jury, nor in the cause, but before the judge, to give his version as to how the alleged confession was obtained from him. His Honor ruled that, as a matter of law, he could not hear the testimony of the defendant, in the absence of the jury, on the preliminary inquiry looking to the admissibility of the alleged confession. In this ruling we think there was error. . . ."

"The case of *BRAM v. UNITED STATES*, 168 U. S. 532, 42 L. Ed., 568, contains an exhaustive review of the English and American authorities on the subject, the opinion of the court being written by Mr. Justice White, with a dissenting opinion filed by Mr. Justice Brewer. See, also, *AMMONS v. STATE*, 80 Miss., 592, as reported in 18 L. R. A. (N.S.), 768, for a collection of the pertinent authorities in a valuable note by the annotator covering the whole subject now under investigation.

"After declining to hear the testimony of the defendant touching the manner in which the alleged confession was secured, the court found as a fact from the evidence of the State's witnesses, that the confession was given voluntarily, and thereupon permitted the solicitor to offer it in evidence against the prisoner.

"The record, therefore, presents the question squarely as

to whether the prisoner, at his own request, was entitled, as a matter of law, to testify before the judge, in the absence of the jury, on the preliminary inquiry addressed only to the court, with respect to the admissibility of the alleged confession as evidence against him. We think the prisoner, at his own request, was entitled to be heard on this preliminary inquiry—the credibility of his testimony, of course, being a matter for the judge.

“In this jurisdiction it is the province of the judge, and not that of the jury, to determine every question, whether of law or of fact, touching the admissibility of evidence. *MONROE v. STUTTS*, 31 N. C. 49. The parties are entitled, as a matter of right, to have the judge definitely decide all questions relating to the admissibility of evidence, and to admit or reject it accordingly. *S v. DICK*, 60 N. C. 440.

“Speaking to the identical question in *S. v. ANDREWS*, 61 N. C. 205, PEARSON, C. J., said: ‘It is the duty of the judge to decide the facts upon which depends the admissibility of testimony; he cannot put upon others the decision of a matter, whether of law or of fact, which he himself is bound to make.’ *S. v. DICK*, 60 N. C., 440. . . . ‘What facts amount to such threats or promises as make confessions not voluntary and admissible in evidence is a question of law, and the decision of the judge in the court below can be reviewed by this Court. So what evidence the judge should allow to be offered to him to establish these facts is a question of law. So whether there be any evidence tending to show that confessions were not made voluntarily is a question of law. But whether the evidence, if true, proves these facts, and whether the witnesses giving testimony to the court touching the facts are entitled to credit or not, and, in case of a conflict of testimony, which witness should be believed by the court are questions of fact to be decided by the judge; and his decision cannot be reviewed in this Court, which is confined to questions of law.’

“And further in the same opinion it is said: ‘The duty of finding the facts preliminary to the admissibility of evidence is often a very embarrassing one, as in this case, where there is a conflict of testimony. But this duty must be discharged by the judge, and the evil of allowing him to let the jury also pass on these facts is this: If he decide for the prisoner and reject the evidence, that is the end of it; whereas, if he decide for the State, and can leave it to the jury to review his decision, it is an induce-

ment for him to decide pro forma for the State, and so the evidence goes to the jury without having the preliminary facts decided according to law.

"This is the fixed law of North Carolina as settled by a long line of decisions. *S. v. DAVIS*, 63 N. C., 578; *S. v. VANN*, 82 N. C., 631; *S. v. EFLER*, 85 N. C., 585; *S. v. SANDERS*, 84 N. C., 728; *S. v. BURGWYN*, 87 N. C. 572; *S. v. CROWSON*, 98 N. C., 595; *S. v. PAGE*, 127 N. C., 513."

The officers had a right to arrest petitioner without warrant and to hold him for investigation. As authority for this position, we direct the attention of the court to the following North Carolina Statutes:

"§ 15-41. *When officer may arrest without warrant.*—Every sheriff, coroner, constable, officer of police, or other officer, entrusted with the care and preservation of the public peace, who shall know or have reasonable ground to believe that any felony has been committed, or that any dangerous wound has been given, and shall have reasonable ground to believe that any particular person is guilty, and shall apprehend that such person may escape, if not immediately arrested, shall arrest him without warrant, and may summon all bystanders to aid in such arrest."

"§ 15-42. *Sheriffs and deputies granted power to arrest felons anywhere in state.*—When a felony is committed in any county in this State, and upon the commission of the felony, the person or persons charged therewith flees or flee the county, the sheriff of the county in which the crime was committed, and/or his bonded deputy or deputies, either with or without process, is hereby given authority to pursue the person or persons so charged, whether in sight or not, and apprehend and arrest him or them anywhere in the State."

"§ 15-46. *Procedure on arrest without warrant.*—Every person arrested without warrant shall be either immediately taken before some magistrate having jurisdiction to issue a warrant in the case, or else committed to the county prison, and, as soon as may be, taken before such magistrate, who, on proper proof, shall issue a warrant and thereon proceed to act as may be required by law."

"§ 15-47. *Arresting officer to inform offender of charge, allow bail except in capital cases, and permit communica-*

*tion with counsel or friends.*—Upon the arrest, detention, or deprivation of the liberties of any person by an officer in this state, with or without warrant, it shall be the duty of the officer making the arrest to immediately inform the person arrested of the charge against him, and it shall further be the duty of the officer making said arrest, except in capital cases, to have bail fixed in a reasonable sum, and the person so arrested shall be permitted to give bail bond; and it shall be the duty of the officer making the arrest to permit the person so arrested to communicate with counsel and friends immediately, and the right of such persons to communicate with counsel and friends shall not be denied."

G. S. 15-47 has been construed by the North Carolina Supreme Court in *STATE v. EXUM*, 213 N.C. 16, 195 S.E. 7, where the court said:

"The evidence at the trial shows that immediately after his arrest, the defendant was informed by the sheriff that he was charged with the murder of James Williams. This is a capital case. For this reason the provisions of the statute with respect to bail are not applicable to this case.

"There is no evidence in the record tending to show that after his arrest and while he was in the custody of the sheriff the defendant demanded of the sheriff that he be permitted to communicate with friends or with counsel. For this reason the provisions of the statute with respect to the right of a defendant in the custody of an officer and charged with the commission of a crime, to communicate with friends and counsel are not applicable to this case.

"Conceding, however, that the sheriff had violated the provisions of the statute, in the instant case, it would not follow that a voluntary confession made by the defendant to the sheriff would be inadmissible as evidence because of such violation. It is not so provided in the statute."

The mere detention and questioning of a suspect is not prohibited either at common law or under due process clause. *LYONS v. OKLAHOMA*, 322 U. S. 596, 88 L.ed. 1481; *LISENBA v. CALIFORNIA*, 314 U. S. 219, 239-241, 86 L.ed. 166, 181, 182.

A criminal prosecution approved by the state should not be set aside as violative of due process without clear proof that such drastic action is required to protect Federal Constitutional rights. *GALLEGOS v. NEBRASKA* U. S.



....., 96 L. Ed. (Adv. Op. No. 3) 82, 86. Mr. Justice Reed, writing the opinion for the Court, continues:

"While our conclusion on due process does not necessarily follow the ultimate determinations of judges or juries as to the voluntary character of a defendant's statements prior to trial, the better opportunity afforded those state agencies to appraise the weight of the evidence, because the witnesses gave it personally before them, leads us to accept their judgment insofar as facts upon which conclusions must be reached are in dispute. The state's ultimate conclusion on guilt is examined from the due process standpoint in the light of facts undisputed by the state.<sup>2</sup> That means not only admitted facts but also those that can be classified from the record as without substantial challenge."

<sup>2</sup> *LYONS v. OKLAHOMA*, 322 U. S. 596, 603, 88 L. ed. 1481, 1486, 64 S. Ct. 1208; *MALINSKI v. NEW YORK*, 324 US 401, 404, 89 L. ed. 1029, 1032, 65 S. Ct. 781; *HALEY v. OHIO*, 332 US 596, 599, 92 L. ed. 224, 228, 68 S. Ct. 302; *WATTS v. INDIANA*, 338 US 49, 51, 93 L. ed. 1801, 1804, 69 S. Ct. 1347, 1357. Cf. *LISENBA v. CALIFORNIA*, 314 US 219, 238-241, 86 L. ed. 166; 180-182, 62 S. Ct. 280.

"As state courts also are charged with applying constitutional standards of due process, in recognition of their superior opportunity to appraise conflicting testimony, we give deference to their conclusions on disputed and essential issues of what actually happened. See note 2, supra."

p. 88. "Compliance with the McNabb rule is required in federal courts by this Court through its power of supervision over the procedure and practices of federal courts in the trial of criminal cases. That power over state criminal trials is not vested in this Court. A confession can be declared inadmissible in a state criminal trial by this Court only when the circumstances under which it is received violate those 'fundamental principles of liberty and justice' protected by the Fourteenth Amendment against infraction by any state."

p. 89. "As pointed out in the Carignan Case, (*UNITED STATES v. CARIGNAN*) ..... US ..... 96 L. Ed. (Adv. Op. No. 2) 57, 72 S. Ct. ...., the mere fact 'that a confession was made while in the custody of the police does not render it inadmissible.'

Mr. Justice Jackson, in a concurring opinion says: "There is not the slightest proof or suggestion by the defendant or his counsel that Nebraska officials abused, threatened, or unduly questioned him. On the contrary, he willingly told how he beat his paramour to death in a fit of jealousy. The only complaint against Nebraska is that it detained Gallegos an unduly long time before arraignment. . . ."

Mr. Jackson continues: "But it is complained that Nebraska held him too long (just how long is too long we never are told) without arraignment. . . . *Certainly due process does not require that charges be placed hurriedly and recklessly. . . .* (Emphasis added)"

The cases cited and relied on by petitioner differ from the instant case. They differ in their forums, their procedure, or else show long continued questioning in relays by officers, brutal treatment, threats, torture, or combination of these factors, plus illegal detention. We look briefly at some of these cases:

WALEY v. JOHNSTON, 316 U.S. 101. The petition alleged coercion, intimidation and threats. This was from a conviction in a Federal Court.

VON MOLTKE v. GILLIES, 332 U.S. 708. This also was from a Federal Court in which the petitioner had pled guilty. In her petition she alleged coercion and that she did not understand what she was doing when she waived her right to counsel.

CHAMBERS v. FLORIDA, 309 U.S. 227. A group of young Negroes were arrested and held in jail without formal charges. They were not permitted to see counsel or friends, and believing they were in danger of mob violence, made confessions at the end of an all-night session, following five days of questioning, each by himself, by State officers and other white citizens in the presence of white men and after a previous confession had been pronounced "unfit" by the prosecuting attorney.

WHITE v. TEXAS, 310 U.S. 530. Here petitioner, an illiterate farm hand, was held in jail for several days without counsel and out of touch with friends. For several nights he was taken, hand-cuffed, by armed officers into the woods for interrogation. In jail, he was placed by himself, where the sheriff kept watching the petitioner and talking to him. A confession was obtained after questioning by the county attorney from 11:00 P.M. to

3:30 A.M. the next morning. During this period, the officers who had taken him to the woods were in and out of the room.

**LISENBA v. CALIFORNIA**, 314 U.S. 219. The petitioner in this case was held incommunicado for a long period of time, was refused counsel and questioned from Sunday night until Tuesday morning. The petitioner made two confessions, one of which was not admitted; but the second one was ruled to be valid. The judgments below were affirmed. The court stating that it could not hold the illegal conduct of the officers coerced the confessions.

**HYSLER v. FLORIDA**, 315 U.S. 411. In this case the petitioner alleged that the testimony of two witnesses implicating him were perjured. He also alleged that they had testified falsely against him because they were "coerced, intimidated, threatened with violence and otherwise abused and mistreated" by the police and were "promised immunity from the electric chair" by the District Attorney.

**WARD v. TEXAS**, 316 U.S. 547. Here the petitioner was arrested without a warrant by a sheriff from another county; he was removed to a county more than one hundred miles away and for three days was driven about from county to county and questioned continuously by various officers who told him of threats of mob violence, and there was little probability of such event. The sheriff testified that he saw evidence of cigarette burns on the petitioner's body.

**ASHCRAFT v. TENNESSEE**, 322 U.S. 143. The petitioner was subjected to a thirty-six hour period of practically continuous questioning, seated under powerful electric lights. This questioning was done by relays of officers and experienced investigators. There is no comparison in the case to the facts now before the Court.

**WATTS v. INDIANA**, 338 U. S. 49. The petitioner Watts has been held for six days, during which time except for Sunday, he was questioned by relays of officers from 5:30 or 6:00 P.M. until 2:00 or 3:00 A.M. He was not taken before a magistrate, as required by Indiana law, and was not advised of his constitutional rights.

**LEE v. MISSISSIPPI**, 332 U.S. 742. This was a case which went to the Supreme Court of the United States on a writ of certiorari to the Supreme Court of Mississippi

to review the judgment of that Court. (This is the same procedure which was followed in the instant case, when certiorari was denied. The denial of certiorari in the instant case lends strong support to the conviction that the Supreme Court of the United States did not find that the petitioner Brown was deprived of any due process or any of his constitutional rights by reason of the admission of his confession in evidence in the trial in the Forsyth County Superior Court.)

**BROWN v. MISSISSIPPI**, 297 U.S. 278. This likewise went to the Supreme Court of the United States upon a writ of certiorari to the Supreme Court of the State of Mississippi. The evidence was clear in this case that the confessions were extorted by brutality and violence. There was no dispute as to the facts of brutality, torture and coercion to obtain the confessions. (Like the case of *Lee v. Mississippi*, supra, this furnishes strong support to the conclusion that if the Supreme Court of the United States had thought that the constitutional rights of Clyde Brown had been violated it would have issued a writ of certiorari to the Supreme Court of North Carolina to review its judgment upon appeal.)

The petitioner quotes from the case of *TURNER v. PENNSYLVANIA*, 338 U.S. 62-67, 93 L.ed. 1810, at length. It should be borne in mind, however, that the facts of that case are different. Turner was questioned by relays of officers from four to six hours a day for five days. He was not permitted to see friends or relatives and was not informed of his right to remain silent.

We say, therefore, that where the findings of the state court are supported by substantial evidence, the same should be upheld, and, in fact, as determined by the cases of *LISENBA v. CALIFORNIA*, supra, and *LYONS v. OKLAHOMA*, supra, the same are final unless unconstitutionality is shown by admitted facts.

At the trial of petitioner in the Superior Court in Forsyth County, the Trial Judge heard all evidence that petitioner's counsel desired to offer and the State's evidence in regard to the voluntariness of the confession. There are thirty-nine pages in the transcript of the trial to the Supreme Court of North Carolina relating to this phase of the examination, beginning on page 94 of the transcript and running through page 133. All of this examination was in the absence of the



jury, which is in accordance with the practice of North Carolina. In this examination three witnesses testified, including the petitioner, Clyde Brown. The record of the testimony of Clyde Brown itself consumes nineteen pages, beginning at page 107 of the transcript and ending on page 126. The highlights of his testimony with regard to the salient points are as follows:

"Q. After she (Mattie Mae) left, you told Capt. Burke that you did come uptown and that you did go to the Clifton Radio Shop, didn't you?

"A. Yes, sir. (Tr. p. 114)

"Q. When you went in who was in there?

"A. Nobody but her.

"Q. But who?"

"A. That girl.

"Q. The girl? Well, she was all right then when you saw the man come out, wasn't she?

"A. Yes.

"Q. Well, what did you mean by telling them that you heard some moaning under the desk, table there, and eased the door shut? What did you tell them that for then?

"A. I told them a lot of different stories.

"Q. You admit that you never told them the truth at any of these preliminary meetings that they had with you? Isn't that right?

"A. That is right." (Tr. p. 115)

"Q. You told your attorney that they did everything they could possibly do to make you comfortable down there, didn't you?

"A. Yes, sir." (Tr. p. 118)

"Q. What did they do with you?

"A. Mr. Reid and Mr. Carter sat down and talked to me.

"Q. How long did they talk with you?

"A. I don't know—about a half an hour.

"Q. Did you tell them the truth on that occasion?

"A. Yes.

"Q. You told them that you did go in there to rob the girl and took her pocketbook, but you didn't rape her, didn't you?

"A. Yes.

"Q. And you told them the truth on that occasion?

"A. Yes.

"Q. You told them how you beat her, didn't you?

"A. Yes.

"Q. And that was the truth, wasn't it?"

"A. Yes.

"Q. They didn't in any way threaten you at that time, did they?"

"A. No.

"Q. Didn't mistreat you in any way, did they?"

"A. No.

"Q. On that occasion they told you and warned you about what your rights were, didn't they?"

"A. Yes.

"Q. But they did tell you that any statement you made would be used against you or for you, as the case may be, didn't they?"

"A. (The witness nodded his head.)" (Tr. 119-120).

"Q. On this Saturday morning you told Mr. Carter and Mr. Reid that you went to the City Market and called this girl to Grossman's Record Shop for the purpose of getting her away from the place, so you could search it, didn't you?"

"A. Yes.

"Q. And that when you called her on the phone, you pretended to be a woman and inquired about a radio, didn't you?"

"A. Yes.

"Q. You told them that you then went to the place and found her in it, didn't you?"

"A. (No answer.)

"Q. Didn't you tell them that? Isn't that correct? Didn't you tell them that on this Saturday morning? Answer the question! Didn't you?"

"A. Saturday morning?

"Q. This Saturday morning when you were talking to Mr. Carter and Mr. Reid; after you told them that you had called her to the telephone and pretended to be a woman, then you told them you went around to the place, didn't you?"

"A. Yes Sir." (Tr. 121-122)

The examination by the court is reported in the opinion of the Supreme Court of North Carolina in *STATE v. BROWN*, supra, (p. 27)

"Q. You remember telling them where to locate the pocketbook?"

"A. Yes." (Tr. 125)

"Q. Don't you remember telling Mr. Carter and Mr. Reid,

"I didn't tell you all the truth, and I want to tell it to you now," on that Monday?

"A. No.

"Q. You don't even remember having a conversation on that day? You don't deny having it, do you?

"A. No sir.

"Q. What?

"A. I don't deny it.

"Q. You don't deny it?

"A. No.

"Q. Well, then, you do remember it?

"A. I do remember it, but I don't remember all of it."

(Tr. 125-126)

After examination of all the witnesses the Court found the following facts:

"It appearing to the Court from the foregoing testimony that the defendant was not denied the right to employ counsel; that he was warned that any statement which he might make could be used against him, and that he was not required to make any statement; and it further appearing to the Court that the defendant was not in any manner physically mistreated, threatened or otherwise coerced; and it further appearing to the Court that the defendant was not offered any reward, hope of reward, promised any immunity or hope of immunity for making said statements;

"The Court, therefore, finds as a fact that said statements were freely and voluntarily given and are competent."

"To the Court's ruling the defendant, in apt time, excepts — EXCEPTION NO. 17." (Tr. 133)

## CONCLUSION

The respondent respectfully urges upon the Court his position that the petitioner is attempting to retry in a habeas corpus proceeding in the federal court and on the same evidence the same questions which have been heard and passed upon by both the trial and the Supreme Court of the State of North Carolina, and the same questions which have been presented to this Court in a petition for a writ of certiorari, which this court has denied, and that petitioner has no right to have these matters re-heard and re-tried on the same evidence in the federal district court. It is respondent's conviction

that the District Court was correct in denying the writ of habeas corpus, and dismissing the petition and in vacating the stay of execution of the judgment of the State Court.

It is respondent's position that this case is like the case of *ADKINS v. SMYTH*, which was heard by the Court of Appeals, 4 Cir., as case No. 6255, and in which a *per curiam* opinion was filed April 10, 1951, (188 F 2d 452). That opinion expresses the law, which the respondent believes applicable to the instant case as follows:

In view of the action of the Supreme Court of Appeals of the State upon the very question presented to the court below and the denial of certiorari by the Supreme Court of the United States, the case falls squarely within the rules that 'a federal district court will not usually reexamine on habeas corpus the question thus adjudicated.' *EX PARTE HAWK*, 321 U.S. 114; *DARR v. BURFORD*, 339 U.S. 200; *GOODWIN v. SMYTH*, 4 Cir. 181 F. 2d 498; *STONEBREAKER v. SMYTH*, 4 Cir., 163 F. 2d 498. As said by this court in the case last cited: 'We are confronted at the outset with the fact that the case presented by petitioner is precisely the same as that in which relief was denied by the Virginia courts and in which certiorari was denied by the Supreme Court of the United States. The rights of petitioner were fully presented in that case and the Virginia courts had full power to grant the relief asked, had they thought petitioner entitled to it. The facts were fully before the Supreme Court of the United States on certiorari; and proper respect for that court compels the conclusion that if it thought that the record showed a denial of petitioner's constitutional rights, certiorari would have been granted and petitioner would have been afforded relief. While action of the Virginia courts and the denial of certiorari by the Supreme Court were not binding on the principle of *res judicata*, they were matters entitled to respectful consideration by the court below; and in the absence of some most unusual situation, they were sufficient reason for that court to deny a further writ of habeas corpus. It would be intolerable that a federal district court should release a prisoner on habeas corpus after the state courts have refused him relief in precisely the same case on a similar writ and the United States Supreme Court has refused to review their action on certiorari. This would be, in effect, to permit a federal district court to review the Supreme Court of the United States as well as the highest court of the state. The rule in such cases was



stated in the case of WHITE v. RAGEN, 324 U.S. 760, 764, 765, 65 S. Ct. 978, 981, 89 L.ed. 1348, relied on by the court below as follows:

"If this court denies certiorari after a state court decision on the merits, or if it reviews the case on the merits, a federal district court will not usually re-examine on habeas corpus the questions thus adjudicated. EX PARTE HAWK, supra, 321 U.S. 118, 64 S. Ct. 448, 88 L.ed 572."

In writing his memorandum opinion in denying the writ the Court below says BROWN v. CRAWFORD, 98 F. Supp. 866 (R. 26-24) beginning at page 27:

"It is not asserted or even suggested by the petitioner that adequate remedies are not provided by North Carolina law to correct the wrongs about which he now complains; in fact, it must be admitted that such remedies existed and that he and his counsel took full advantage of them. It cannot be maintained, in fact, it is not even alleged, that petitioner was in any way or to any extent limited or restricted in his resort to such remedies. No one, upon the record, would conclude that the action of the State Courts in deciding the questions now raised was indifferently or lightly considered. The decision in each instance was reached after painstaking and careful procedure in accordance with law and practice and only after petitioner had had his full say. *The petitioner has had his day in Court and his present positions have been rejected by a Court which had and did not lose jurisdiction and on a record which seems to demonstrate that petitioner was given a fair and impartial trial; in which he was accorded all rights guaranteed to him by the federal Constitution and dictated by the principles of justice.* In addition, the Supreme Court of the United States has refused to review such action of the State Court. *The record does not present any unusual situation which would justify the issue of the writ and, therefore, the petition for such writ has been denied.* (Emphasis added)

"It would serve no good purpose to review the cases. Two cases decided by our Circuit Court of Appeals clearly support the conclusion reached. These are: STONEBREAKER v. SMITH, 163 Fed. 2nd. 498, and JERRY ADKINS v. W. FRANK SMITH, decided April 10, 1951. (And the opinion quotes from the Adkins case much that appears above).

*"There appears no semblance of reason for a departure from the general rule laid down in these two cases."*  
(Emphasis added)

In this petition for habeas corpus in the Federal Courts the petitioner, Clyde Brown, who admitted assaulting, brutally beating, robbing and raping a 17-year old girl who was alone at her father's radio shop, attempts to put on trial the judicial system of North Carolina, the County Commissioners of Forsyth County, the Grand Jury which indicted him, and the Judge who tried him. It is noteworthy that petitioner does not take any exception to the constitution of the petit jury which tried him. In fact his counsel stipulates with the Solicitor that of the regular veniremen summoned for the trial, of the 37 jurors 8 (21%) were Negroes; that of the 20 special veniremen, 3 (15%) were Negroes. Under the system of jury selection for North Carolina all of these veniremen came from the same box containing the 40,000 names as was testified to by those in charge of making up the jury list. This respondent respectfully contends that the petition has no right to this.

Mr. Justice Jackson, in his dissenting opinion in *CASSELL v. TEXAS*, 339 U.S. 282, 301, 94 L.ed. 839, 854, says:

"This Court never has explained how discrimination in the selection of a Grand Jury, illegal though it be, has prejudiced a defendant whom a trial jury, chosen with no discrimination, has convicted."

And again (339 U. S. 282, 302; 94 L.ed. 839, 855):

"The grand jury is a very different institution (from a trial jury). The States are not required to use it at all. *HURTADO v. CALIFORNIA*, 110 U.S. 516; 28 L. Ed. 232, 4 S. Ct. 111, 292. Its power is only to accuse, not to convict. Its indictment does not even create a presumption of guilt; all that it charges must later be proved before the trial jury, and then beyond a reasonable doubt. The grand jury need not be unanimous. It does not hear both sides but only the prosecution's evidence, and does not face the problem of a choice between two adversaries. Its duty is to indict if the prosecution's evidence, unexplained, uncontradicted and unsupplemented, would warrant a conviction. If so, its indictment merely puts the accused to trial. The difference between the function of a trial jury and the function of a grand jury is all the

difference between deciding a case and merely deciding that a case should be tried.

"It hardly lies in the mouth of a defendant whom a fairly chosen trial jury has found guilty beyond reasonable doubt, to say that his indictment is attributable to prejudice. . . ."

In this case the District Court was able to view the facts on which the opposing parties relied and upon these facts found that applicant was not entitled to the writ (R. 29, 35).

This procedure is authorized by the statute, 28 USCA § 2243, and is approved in the opinions of this Court. *WALKER v. JOHNSTON*, 312 US 275, 85 L. ed. 830, the case cited by petitioner in support of his contention that the District Court is required to issue the writ, hold a hearing and take testimony, approves this procedure. One question presented in that case is: "(1) Was the District Court, on the filing of the petition, bound forthwith to issue the writ and have the petitioner produced in answer to it?" (p. 283). In response to this question the court says, (p. 284): "It will be observed that if, upon the face of the petition, it appears that the party is not entitled to the writ, the court may refuse to issue it. *Since the allegations of such petitions are often inconclusive, the practice has grown up of issuing an order to show cause, which the respondent may answer. By this procedure the facts on which the opposing parties rely may be exhibited, and the court may find that no issue of fact is involved. In this way unless grant of the writ with consequent production of the prisoner and the witnesses may be avoided where from undisputed facts or from incontrovertible facts, such as those recited in a court record, it appears, as matter of law, no cause for granting the writ exists. . . . This practice has long been followed by this court and by the lower courts.* It is a convenient one, deprives the petitioner of no substantial right, if the petition and traverse are treated, as we think they should be, as together constituting the application for the writ, and the return to the rule as setting up the facts thought to warrant its denial, and if issues of fact emerging from the pleadings are tried as required by the statute." (Emphasis added), *Ex parte QUIRIN*, 317 US 24, 87 L. ed. 10.

In view of the record and the applicable law, the respondent most respectfully contends that the order of the Circuit

Court affirming the order of the District Court denying the writ of habeas corpus should be affirmed.

Respectfully submitted,

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Attorneys for Appelle.



## APPENDIX

## Chapter 7. General Statutes of North Carolina:

§ 7-63. *Original jurisdiction.*—The superior court has original jurisdiction of all civil actions whereof exclusive original jurisdiction is not given to some other court; and of all criminal actions in which the punishment may exceed a fine of fifty dollars, or imprisonment for thirty days; and of all such affrays as shall be committed within one mile of the place where, and during the time, such court is being held; and of all offenses whereof exclusive original jurisdiction is given to justices of the peace, if some justice of the peace shall not within twelve months after the commission of the offense proceed to take official cognizance thereof.

## Chapter 14. General Statutes of North Carolina:

§ 14-21. *Punishment for rape.*—Every person who is convicted of ravishing and carnally knowing any female of the age of twelve years or more by force and against her will, or who is convicted of unlawfully and carnally knowing and abusing any female child under the age of twelve years, shall suffer death: Provided, if the jury shall so recommend at the time of rendering its verdict in open court, the punishment shall be imprisonment for life in the state's prison, and the court shall so instruct the jury.

## Chapter 9. General Statutes of North Carolina:

§ 9-1. *Jury list from taxpayers of good character.*—The board of county commissioners for the several counties, at their regular meetings on the first Monday in June in the year 1947, or the jury commissions or such other legally constituted body as may in the respective counties be charged by law with the duty of drawing names of persons for jury service, at the times of their regular meetings, and every two years thereafter, shall cause their clerks to lay before them the tax returns for the preceding year for their county, and a list of names of persons who do not appear upon the tax lists, who are residents of the county and over twenty-one years of age, from which lists the board of county commissioners or such jury commissions shall select the names of

such persons who reside in the county who are of good moral character and have sufficient intelligence to serve as members of grand and petit juries. A list of the names thus selected by the board of county commissioners or such jury commissions shall be made out by the clerk of the board of county commissioners or such jury commissions and shall constitute the jury list of the county and shall be preserved as such.

The clerk of the board of county commissioners or such jury commissions, in making out the list of names to be laid before the board of county commissioners or such jury commissions, may secure said lists from such sources of information as deemed reliable which will provide the names of persons of the county above twenty-one years of age residing within the county qualified for jury duty. There shall be excluded from said lists all those persons who have been convicted of any crime involving moral turpitude or who have been adjudged to be non compos mentis.

§ 9-2. *Names on list put in box.*—The commissioners at their regular meeting on the first Monday in July in the year nineteen hundred and five, and every two years thereafter, shall cause the names on their jury list to be copied on small scrolls of paper of equal size and put into a box procured for that purpose, which must have two divisions marked No. 1 and No. 2, respectively, and two locks, the key of one to be kept by the sheriff of the county, the other by the chairman of the board of commissioners, and the box by the clerk of the board.

§ 9-3. *Manner of drawing panel for term from box.*—At least twenty days before each regular or special term of the superior court, the board of commissioners of the county shall cause to be drawn from the jury box out of the partition marked No. 1, by a child not more than ten years of age, thirty-six scrolls except when the term of court is for the trials of civil cases exclusively, when they need not draw more than twenty-four scrolls. The persons whose names are inscribed on said scrolls shall serve as jurors at the term of the superior court to be held for the county ensuing such drawing, and for which they are drawn. The scrolls so drawn to make the jury shall be put into the partition marked No. 2. The said commissioners shall at the same time and in the

same manner draw the names of eighteen persons who shall be summoned to appear and serve during the second week, and a like number for each succeeding week of the term of said court, unless the judge thereof shall sooner discharge all jurors from further service. The said commissioners may, at the same time and in the same manner, draw the names of eighteen other persons, who shall serve as petit jurors for the week for which they are drawn and summoned. The trial jury which has served during each week shall be discharged by the judge at the close of said week, unless the said jury shall be then actually engaged in the trial of a case, and then they shall not be discharged until the trial is determined.

§ 9-4. *Local modifications as to drawing panel—*

In Forsyth county the board of county commissioners is authorized and empowered to draw as jurors from the box, as provided in the preceding section, an additional number of jurors to those now provided by law. At all civil terms, regular and special, for the first week thirty jurors shall be drawn and summoned, and likewise for the second week. At all criminal terms, regular and special, for the first week forty-two jurors shall be drawn and summoned.

For the second week thirty jurors shall be drawn and summoned.

§ 9-14. *Jury sworn; judge decides competency.*—The clerk shall, at the beginning of the court, swear such of the petit jury as are of the original panel, to try all civil cases; and if there should not be enough of the original panel the talesmen shall be sworn. The petit jurors of the original panel, as well as talesmen, shall be sworn as prescribed in the chapter entitled Oaths. Nothing herein shall be construed to disallow the usual challenges in law to the whole jury so sworn or to any of them; and if by reason of such challenge, any juror is withdrawn, his place on the jury shall be supplied by any of the original venire, or from the bystanders qualified to serve as jurors. The judge or other presiding officer of the court shall decide all questions as to the competency of jurors in both civil and criminal actions.

§ 9-19. *Exemptions from jury duty.*—All practicing physicians, licensed druggists, telegraph operators who are in the

regular employ of any telegraph company or railroad company, train dispatchers who have the actual handling of either freight or passenger trains, regularly licensed pilots, regular ministers of the gospel, officers or employees of a state hospital for the insane, active members of a fire company, funeral directors and embalmers, printers and linotype operators, all millers of grist mills, all United State railway postal clerks and rural free delivery mail carriers, locomotive engineers, brakemen and railroad conductors in active service, radio broadcast technicians, announcers, and optometrists, registered or practical nurses in active practice and practicing attorneys at law, and all members of the national guard, North Carolina state guard and members of the civil air patrol, naval militia, officers reserve corps, enlisted reserve corps, and the naval reserves, who comply with and perform all duties required of them as members of the national guard, naval militia, officers reserve corps, enlisted reserve corps, and the naval reserves, shall be exempt from service as jurors.

§ 9-24. *How grand jury drawn.*—The judges of the superior court, at the terms of their courts, except those terms which are for the trial of civil cases exclusively, and special terms for which no grand jury has been ordered, shall direct the names of all persons returned as jurors to be written on scrolls of paper and put into a box or hat and drawn out by a child under ten years of age; whereof the first eighteen drawn shall be a grand jury for the court; and the residue shall serve as petit jurors for the court.

§ 9-26. *Exceptions for disqualifications.*—All exceptions to grand jurors for and on account of their disqualifications shall be taken before the jury is sworn and impaneled to try the issue, by motion to quash the indictment, and if not so taken, the same shall be deemed to be waived. But no indictment shall be quashed, nor shall judgment thereon be arrested, by reason of the fact that any member of the grand jury finding such bills of indictment had not paid his taxes for the preceding year, or was a party to any suit pending and at issue.



264, P-L Laws of 1947, and as amended by chap. 577, 1949 Session Laws):

§ 1. That at the first week of the first term of court for the trial of criminal cases in Forsyth County, after the first day of July, one thousand nine hundred and thirty-seven, there shall be chosen a grand jury as now provided by law, and said grand jury will serve until the first day of January, one thousand nine hundred and thirty-eight, "and thereafter at the first week of the first term of the criminal court convening after the twenty-fifth day of December and June of each year there shall be chosen a grand jury to serve for a term of six months."

§ 2. The judge presiding at the time of the selection of the grand jury shall charge it as provided by law, and at any time the Judge of the Superior Court presiding over the criminal court of Forsyth County may cause said grand jury to assemble and may deliver unto said jury an additional charge.

§ 3. The judge presiding at any term of criminal court of Forsyth County may in his discretion discharge any or all of the members of the grand jury or fill any vacancies occurring in the grand jury by reason of death, removal from the county, sickness, or otherwise, and any such vacancy or vacancies shall be filled by drawing sufficient jurors to fill said vacancy or vacancies from the jury box, and said juror or jurors so drawn shall take the oath prescribed by law and shall fill out the unexpired term of the juror or jurors whose places they were drawn to fill. The presiding judge shall have the power in his discretion to appoint an assistant foreman, and said assistant foreman so appointed shall in the absence or disqualification of the foreman discharge the duties of the foreman of said grand jury.

§ 4. That at the first week of the terms of criminal court of Forsyth County at which a grand jury shall be selected in accordance with the provisions of this Act there shall be drawn and summoned sixty men in the manner now provided by law from which a grand jury shall be selected as herein provided for, and the persons drawn for service on the grand jury for the week at which said grand jury is se-

lected and who are not selected to serve on the grand jury shall serve on the petit jury: *Provided* that for the second week of the term at which the grand jury is chosen and for each week of other terms of the Superior Court of Forsyth County, civil and criminal, both regular and special, forty-four jurors shall be drawn and summoned as provided by law.

## VERNON'S TEXAS STATUTES, 1948

### TITLE 7—AFTER COMMITMENT OR BAIL AND BEFORE THE TRIAL

#### CHAPTER 1.—ORGANIZATION OF THE GRAND JURY

ART. 333. *Appointment of jury commissioners.*—The District Judge shall at each term of the District Court appoint not less than three (3), nor more than five (5) persons to perform the duties of Jury Commissioners, and shall cause the sheriff to notify them of their appointment, and when and where they are to appear. Such Commissioners shall possess the following qualifications:

1. Be intelligent citizens of the county and able to read and write.
2. Be qualified jurors and freeholders in the county.
3. Be residents of different portions of the county.
4. Have no suit in said Court which requires the intervention of a jury.
5. The same person shall not act as Jury Commissioner more than once in the same year.

ART. 334. *Notified of appointment.*—The judge shall cause the proper officer to notify such appointees of such appointment, and when and where they are to appear.

ART. 335. *Oath of commissioners.*—When the appointees appear before the judge, he shall administer to them the following oath: "You do swear faithfully to discharge the duties required of you as jury commissioners: that you will not knowingly elect any man as jurymen whom you believe to be unfit and not qualified; that you will not make known to any one the name of any jurymen selected by you and report to the court; that you will not, directly or indirectly, converse with any one selected by you as a jurymen concerning the



merits of any case to be tried at the next term of this court, until after said cause may be tried or continued, or the jury discharged."

ART. 336. *Instructed.*—The jury commissioners, after they have been organized and sworn, shall be instructed by the judge in their duties and shall then retire in charge of the sheriff to a suitable room to be secured by the sheriff for that purpose. The clerk shall furnish them the necessary stationery, the names of those appearing from the records of the court to be exempt or disqualified from serving on the jury at each term, and the last assessment roll of the county.

ART. 337. *Kept free from intrusion.*—The jury commissioners shall be kept free from the intrusion of any person during their session, and shall not separate without leave of the court until they complete their duties.

ART. 338. *Shall select grand jurors.*—The jury commissioners shall select sixteen men from the citizens of the different portions of the county to be summoned as grand jurors for the next term of the court.

ART. 339. *Qualifications.*—No person shall be selected or serve as a grand juror who does not possess the following qualifications:

1. He must be a citizen of the State, and of the county in which he is to serve, and qualified under the Constitution and laws to vote in said county; but, whenever it shall be made to appear to the court that the requisite number of jurors who have paid their poll-taxes can not be found within the county, the court shall not regard the payment of poll taxes as a qualification for service as a juror.
2. He must be a freeholder within the State, or a householder within the county.
3. He must be of sound mind and good moral character.
4. He must be able to read and write.
5. He must not have been convicted of any felony.
6. He must not be under indictment or other legal accusation for theft or of any felony.

ART. 340. *Names returned.*—The names of those selected as grand jurors by the commissioners shall be written upon

a paper; and the fact that they were so selected shall be certified and signed by the jury commissioners, who shall place said paper, so certified and signed, in an envelope, and seal the same, and indorse thereon the words, "The list of grand jurors selected at ..... term of the district court," the blank being for the month and year in which the term of the court began its session. The commissioners shall write their names across the seal of said envelope, direct the same to the district judge and deliver it to him in open court.

ART. 341. *List to clerk.*—The judge shall deliver the envelope containing the list of grand jurors to the clerk or one of his deputies in open court without opening the same.

ART. 344. *Clerk shall open list.*—The grand jury may be convened on the first or any subsequent day of the term. The Judge shall designate the day on which the grand jury is to be impaneled and notify the Clerk of such date; and within thirty (30) days of such date, and not before, the Clerk shall open the envelope containing the list of grand jurors, make out a copy of the names of those selected as grand jurors, certify to it under his official seal, note thereon the day for which they are to be summoned, and deliver it to the Sheriff.

ART. 349. *If less than twelve attend.*—When less than twelve of those summoned to serve as grand jurors are found to be in attendance and qualified to so serve, the court shall order the sheriff to summon such additional number of persons as may be deemed necessary to constitute a grand jury of twelve men.

ART. 352. *To test qualifications.*—When as many as twelve men summoned to served as grand jurors are in attendance upon the court, is shall proceed to test their qualifications as such.

ART. 353. *Interrogated.*—Each person who is presented to serve as a grand juror shall, before being impaneled, be interrogated on oath by the court or under his direction, touching his qualifications.

ART. 354. *Mode of test.*—In trying the qualifications of any person to serve as a grand juror, he shall be asked:

1. Are you a citizen of this State and county, and qualified to vote in this county, under the Constitution and laws of this State?

2. Are you a freeholder in this State or a householder in this county?

3. Are you able to read and write?

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1951

22  
No. 643

RALEIGH SPELLER,

*Petitioner,*

vs.

ROBERT A. ALLEN, WARDEN, CENTRAL PRISON OF THE  
STATE OF NORTH CAROLINA, RALEIGH, NORTH CAROLINA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

BRIEF OF PETITIONER

HERMAN L. TAYLOR,  
*Counsel for Petitioner.*



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### I

The writ of habeas corpus is available in a Federal Court to a petitioner imprisoned pursuant to state process, upon the grounds of denial in the State trial of a federal constitutional right, to wit, denial of equal protection of the laws to said petitioner through arbitrary exclusion of negroes, members of petitioner's race from the trial jury, solely on account of race

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### II

The writ of habeas corpus is available to petitioner under the procedural circumstances which obtain in the instant case

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### III

The facts in evidence in the instant case establish that petitioner was denied equal protection of the laws in his trial in the state court, in violation of the federal constitution through arbitrary exclusion of negroes from juries in Vance County solely on account of race

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# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

**No. 643**

**RALEIGH SPELLER,**

*Petitioner,*

*vs.*

**ROBERT A. ALLEN, WARDEN, CENTRAL PRISON OF THE  
STATE OF NORTH CAROLINA, RALEIGH, NORTH CAROLINA,**

*Respondent*

## **BRIEF OF PETITIONER**

### **Opinions Below**

The opinion of the United States District Court for the Eastern District of North Carolina, Raleigh Division, is reported at 99 F. Supp. 92, *sub nom. Speller v. Crawford*; <sup>1</sup> the opinion of the Court of Appeals for the Fourth Circuit is reported at 192 F. 2d 477.

### **Jurisdiction**

The judgment of the Court of Appeals, affirming the order and judgment of the District Court vacating the writ of

<sup>1</sup> By order of the Court of Appeals for the Fourth Circuit dated October 13, 1951, Robert A. Allen, the successor to J. P. Crawford as Warden of Central Prison of the State of North Carolina, was substituted as appellee.



habeas corpus theretofore issued by said District Court, dismissing the petition of petitioner for such writ of habeas corpus, and remanding petitioner to the custody of Respondent, the Warden of the Central Prison of the State of North Carolina, wherein petitioner is an inmate of the death house, under sentence of death by asphyxiation, petitioner having previously been indicted, tried and convicted without recommendation of mercy in the Superior Court of Bertie County, North Carolina, by a jury called from Vance County, an adjoining county, for the crime of rape, was rendered and entered on November 5, 1951 (R. 153-156). Petition for writ of certiorari from this Court to the Court of Appeals was thereafter timely made and certiorari was granted by order of this Court on March 10, 1952 (R. 157) (342 U. S. 953).

The jurisdiction of this Court is conferred by Section 1254(1) of Title 28 of the United States Code.

### **Statutes Involved**

#### **1. Section 2241, Title 28, United States Code:**

“(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(c) The writ of habeas corpus shall not extend to a prisoner unless— . . . (3) He is in custody in violation of the Constitution or laws or treaties of the United States.”

#### **2. Section 2254, Title 28, United States Code:**

“Any application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of

a state court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

### **- Statement of Case**

Petitioner, a Negro and an inmate of Central Prison of the State of North Carolina, was convicted for the third time of the capital crime of rape at the August, 1949 Term of the Superior Court of Bertie County, North Carolina, on the 5th day of September, 1949. The first indictment upon which petitioner was tried was found at the August, 1947 Term of Bertie County Superior Court by a grand jury; he was tried and convicted under this indictment at the November, 1947 Term of said Court, but upon appeal from said conviction to the Supreme Court of North Carolina, said conviction was reversed (*State v. Raleigh Speller*, 229 N. C. 67, 47 S. E. (2d) 537), upon the ground that the said indictment was invalid, because of arbitrary exclusion of Negroes from grand juries in Bertie County on account of race. A second indictment was returned at the August, 1948 Term of Bertie County Superior Court by a grand jury on which appeared two members of the Negro race; the question of the validity of this second indictment has not been raised. At the ensuing November, 1948 Term of said Court, petitioner was tried upon said second indictment and convicted by a jury drawn from Warren County, a county in the same Judicial District as Bertie County, and sentenced to death. Upon appeal from the second conviction

and sentence, the Supreme Court of North Carolina vacated the second conviction and granted petitioner a new trial for the reason that the trial judge refused to give counsel for defense time to investigate the facts and to procure evidence from Warren County in support of a challenge to the array of jurors called from Warren County to try the cause, based upon the ground of systematic exclusion of Negroes from juries in Warren County on account of race (*State v. Raleigh Speller*, 230 N. C. 345, 53 S. E. (2d) 294). The third trial of petitioner, the one now questioned, was held at the August, 1949 Term of the same Court; at the outset of said trial, pursuant to motion made by petitioner that a jury be drawn from some county other than Bertie County to sit in said trial, the trial judge ordered that a special venire of one hundred jurors be summoned from Vance County, a county in the same Judicial District as Bertie County, for the purpose of said trial. After entry of a plea of not guilty to the indictment and prior to the empanelling of the jury, petitioner challenged the entire array of special veniremen summoned from Vance County, upon the grounds that the officials of Vance County, whose duty it was to prepare the jury list, arbitrarily, systematically and purposefully discriminated against members of the Negro race in the preparation of the jury box and jury list in said County, solely on account of race. The trial court overruled petitioner's said challenge, and thereafter the jury returned a verdict of guilty without recommendation of mercy, and petitioner was again sentenced to death. From this last judgment and sentence petitioner again appealed to the Supreme Court of North Carolina, and on this appeal the judgment of the trial court was affirmed (*State v. Raleigh Speller*, 231 N. C. 549, 57 S. E. (2d) 759).

Upon the affirmation by the Supreme Court of North Carolina of petitioner's third conviction and sentence, petitioner applied to the Supreme Court of the United States

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for writ of certiorari to review the decision of the Supreme Court of North Carolina, and on the 9th day of October, 1950, the Supreme Court of the United States denied said application without opinion (*Raleigh Speller, Petitioner, v. State of North Carolina*, 71 S. Ct. 18).

Upon the denial of the petition for writ of certiorari by the Supreme Court of the United States, petitioner filed before the United States District Court for the Eastern District of North Carolina a petition for writ of habeas corpus, and said writ issued and an order entered staying the execution of the judgment of the State Court pending hearing. At the outset of the hearing upon the return, the respondent filed a motion to discharge the writ without the taking of evidence, for that, as contended by respondent, the Court was without jurisdiction in the premises. The Court reserved its decision upon the motion and proceeded to the taking of evidence from both the petitioner and respondent. At the conclusion of all the evidence the respondent renewed his motion to dismiss, and said motion was at said time likewise denied and overruled. Thereafter, the trial court filed certain findings of fact and conclusions of law and a memorandum opinion, as appears in the record herein (R. 99-112), sustaining the position of respondent, and thereupon, the writ of *habeas corpus* theretofore issued was discharged. Subsequent thereto, petitioner duly filed notice of appeal and with leave of the Trial Court appealed his cause to the United States Court of Appeals for the Fourth Circuit. This latter appeal was heard on October 12, 1951, and the judgment of the District Court affirmed by decision of the said Court of Appeals on November 9, 1951.

Petitioner thereupon filed with this Court his petition for writ of certiorari and for permission to proceed *in forma pauperis*. The petition was granted, together with leave to proceed *in forma pauperis*. 342 U. S. 953.



### Statement of the Facts

The facts touching upon the innocence or guilt of petitioner of the crime charged appear in the Records of the trial of petitioner in the Superior Court of Bertie County, the record of the third trial, upon which the instant proceedings are predicated, being before this Court as a part of the record on appeal. Succinctly stated, the evidence adduced by the State during the three trials of petitioner hereinbefore referred to, tended to show that on Friday night, July 18; 1947, the prosecuting witness, Mrs. Aubrey Davis, a white lady, was preparing to retire around 10:30 P. M. Mr. Davis, her husband, who is deaf, had retired about a half an hour or forty-five minutes prior to that time. Clad in a night gown, step-ins and a pair of slip-on shoes, Mrs. Davis went to the screen door at the end of her back hall, which opened on a back porch, to see if it was locked, and finding the screen door unlocked, and the latch bent so that it would not hook, Mrs. Davis stepped out on the back porch to get a hammer which was lying on a table on the porch, which she used to straighten the latch on the screen door. Stepping back out on the porch to put the hammer back on the table, Mrs. Davis was grabbed by someone whom she described to be a light-complexioned colored man, who suddenly dashed up on the porch from a hiding place in the shadows at the edge of her house. The man clinched Mrs. Davis in his embrace, dragged her from the porch out into the yard a few feet from the porch, and there allegedly assaulted her. Sometime during the course of the assault the prosecutrix lost consciousness. Regaining consciousness after the lapse of an indefinite period of time, the prosecutrix made an alarm to which neighbors and officers of the law allegedly responded. Thereafter, without any description from the prosecuting witness of how her assailant looked, other than her statement that he was a light-

complexioned colored man, the police picked up the petitioner at a little roadside inn, located approximately 600 feet from the scene of the alleged crime, because, as the officers testified, the defendant, who had been drinking, was perspiring (in the month of July) and looked suspicious. Upon trial the petitioner was represented by the State to be the light-complexioned man who committed the alleged crime, and the jury upon this representation and the evidence introduced by the State, convicted petitioner of the crime with which he was charged.

During the first and third trials, petitioner introduced no evidence in his behalf, choosing rather to rely upon what he considered to be the weakness of the State's case and errors in law committed during the course of the trial. In the second trial, however, petitioner introduced evidence, through his own testimony, and that of five other disinterested witnesses, which tended to establish his presence at a place other than that at which the crime herein involved was allegedly committed, and at the time of its alleged commission.

### Questions Presented

The instant case is a companion case to two other cases contemporaneously on appeal to this Court from a ruling of the Court of Appeals for the Fourth Circuit and the United States District Court for the Eastern District of North Carolina (*Bennie Daniels and Lloyd Ray Daniels, Petitioners, v. Robert A. Allen, Warden, Respondent*; and *Clyde Brown, Petitioner v. Robert A. Allen, Warden, Respondent*, and said cases were, for the most part handled as one, particularly in the District Court. The three said cases appeared to the District Court to be cases of first impression, and a consideration of the opinions entered by the said Court in said cases, as well as the opinion of the Court of Appeals, in general, and for the purpose of the instant ap-

peal, in particular, poses the following as the questions before this Court in the appeal of this matter:

(1) Is the writ of habeas corpus available in a Federal Court to a petitioner imprisoned pursuant to State process, upon the grounds of denial in the State trial of a federal constitutional right, to wit, denial of equal protection of the laws to said petitioner through, arbitrary exclusion of members of petitioner's race from the trial jury, solely on account of race?

(2) Is the writ of habeas corpus available to petitioner under the procedural circumstances which obtain in the instant case?

(3) If said writ is available, do the facts in evidence in the instant case establish, as contended by petitioner, that in his trial he was denied equal protection of the laws, in violation of the Federal Constitution, in the manner set out?

### **Specification of Error**

The Court of Appeals for the Fourth Circuit erred in affirming the judgment of the District Court dismissing the petition for a writ of *habeas corpus* brought to secure petitioner's discharge from the custody of respondent.

### **Summary of Argument**

Petitioner contends that under the law, as it obtains in federal courts and as regards the jurisdiction of federal courts in habeas corpus proceedings, the remedy of habeas corpus is available to him in a federal court in the instant case to secure his discharge from imprisonment pursuant to a judgment of a state court, where his said imprisonment or confinement is in violation of a federally guaranteed right. Petitioner further contends herein that the evidence in the instant case indisputably reveals and establishes that Negroes were and have been over the past fifty years or more intentionally and arbitrarily excluded from and dis-

criminated against in the constitution of grand and petit juries of Vance County, North Carolina, from which County was selected the petit jury which tried and convicted him, and that the said practice resulted in a denial to him of the sort and type of trial required and guaranteed by the federal constitution.

## ARGUMENT

**The Writ of Habeas Corpus Is Available in a Federal Court to a Petitioner Imprisoned Pursuant to State Process, upon the Grounds of Denial in the State Trial of Federal Constitutional Right, To Wit, Denial of Equal Protection of the Laws to Said Petitioner Through Arbitrary Exclusion of Members of Petitioner's Race from the Trial Jury, Solely on Account of Race.**

As heretofore pointed out, the instant case is a companion to two other cases coming from the United States District Court for the Eastern District of North Carolina and contemporaneously before this Court on appeal from the Court of Appeals for the Fourth Circuit, to wit, *Daniels v. Allen*, No. 626, October Term, 1951, and *Brown v. Allen*, No. 670, October Term, 1951. On the issue of availability of the writ of habeas corpus in a federal court to secure discharge from confinement pursuant to a state judgment, it appears that these three cases involve a common question of law. Counsel in *Daniels v. Allen*, No. 626, in which case counsel in the instant case is also one of the counsel for the petitioners in said case, have heretofore filed before this Court a brief containing a detailed statement of the law on this point, and for this reason this issue will not be argued quite so elaborately in the instant brief.

It is apparent from the memorandum opinion entered in the instant case by the District Court that the primary, if not the sole, basis for the Court's discharging the writ of



habeas corpus theretofore granted to petitioner was the Court's conclusion and impression that upon the state of the law, he had no jurisdiction to grant the writ of habeas corpus under circumstances such as those which obtained in this case. Although the Court heard testimony in the instant proceedings on the issues raised, he did so reserving, in effect, a ruling on a motion made by respondent to dismiss the proceedings for lack of jurisdiction in the premises, and thereafter at the conclusion of the trial adopted the position taken by the respondent that under the procedural history of the instant case, the Court did not have jurisdiction to issue a writ of habeas corpus in said matter. Thus, the crucial issue in the instant case appears to be the propriety and correctness of the position taken by the Court with respect to this issue. This section of the instant brief is addressed to this issue. In view of the fact that the instant case is one of three companion cases, as hereinbefore stated, and in view of the further fact that there were common counsel connected with the said cases, much of the law set out in the briefs filed must necessarily be repetitious.

Any discussion of the instances wherein the writ of habeas corpus will issue from a federal court must begin with the applicable statute, Section 2241 of Title 28 of the United States Code. It is therein provided that the writ will extend "to a prisoner . . . in custody in violation of the Constitution or laws or treaties of the United States." [Section 2241(c)(3).] Of this Section Judge Dobie of the Fourth Circuit once wrote:

"This is the clause of widest general importance . . . It applies to both state and federal custody. Its purpose is to provide a summary remedy in the federal courts to those imprisoned in violation of their rights under the federal constitution, laws, or treaties, and to make these not only the supreme, but also the readily enforceable, law of the land.

"The provision of the Fifth Amendment . . . and the Fourteenth Amendment . . . seem to be the most fruitful sources of this jurisdiction. . . .

"Federal courts can issue *habeas corpus* to release one as well from state as from federal custody. This power is now too clear to admit of serious debate. It has been exercised in countless cases."

Dobie, "Habeas Corpus in the Federal Courts," 13 Virginia Law Rev. 433, 444, 446.

The federal courts were not always thus equipped to implement the constitutional rights contained in the Fourteenth Amendment. For no provision is contained in the Constitution for federal habeas corpus jurisdiction, and that jurisdiction was narrowly circumscribed in our early history. Only after the Civil War did the federal power gain impetus.

" . . . the statute of 1867 [14 Stat. 358], designed to enforce the Reconstruction Acts, and to effectuate the warwon liberty of all persons, made two drastic changes in federal habeas corpus. The writ would now be granted for any detention in violation of the Constitution or laws of the United States. In addition to this change in substantive grounds, federal habeas corpus, when invoked on such grounds, was made available to all persons whether in state or federal custody. The Fourteenth Amendment, by assuring freedom from improper state processes, increased the constitutional rights enforceable by habeas corpus."

Note, "The Freedom Writ—The Expanding Use of Habeas Corpus," 61 Harvard Law Rev. 657, 659.

Even after the enactment in 1867 of the predecessor statute to the present Section 2241(c)(3), the power of the federal courts to issue the writ was narrowly construed. The common law rule, which confined habeas corpus to the inquiry whether the prisoner was held under final process based upon a judgment or decree of a court of competent

jurisdiction (*Ex Parte Watkins*, 3 Pet. (U. S.) 193, 202), apparently was followed as late as 1895 in dictum in *Andrews v. Swartz*, 156 U. S. 272, although in the earlier case of *Ex parte Neilson*, 131 U. S. 176, this Court held the writ available to attack a judgment rendered by a court of competent jurisdiction where "a constitutional immunity of the defendant was violated" (131 U. S. 183) on the ground that jurisdiction could be lost if the court acted "contrary to an express provision of the Constitution" (i.d.). Whatever the strictures placed upon federal habeas corpus in the early years following 1867, "the law governing its exercise has been continuously broadened since that time by decisions of the Supreme Court." (Peters, "Collateral Attack by Habeas Corpus upon Federal Judgments in Criminal Cases", 23 Washington Law Rev. 87, 89.) As will be seen, this Court has completely discarded the old common law limitations upon habeas corpus, and the writ is now available, as the statute requires, where conviction is "in violation of the Constitution or laws or treaties of the United States." As stated by the Chief Judge of the Fourth Circuit, the rule at present is that:

"There is preserved in full the right of persons imprisoned under judgments of state and federal courts to ask release on the grounds that they have been denied the sort of trial guaranteed by the Constitution . . . ."

Parker, "Limiting the Abuse of Habeas Corpus," 8 F. R. D. 171, 178. See also Note, "The Writ of Habeas Corpus in the Federal Courts," 35 Columbia Law Rev. 404.

A full review of this Court's decisions developing and expanding the scope and function of federal habeas corpus jurisdiction is set out as *Hawk v. Olsen*, 326 U. S. 271, 274-276, and with the indulgence of the Court that discussion is quoted here at length because it summarizes more succinctly

than could petitioner the history of federal habeas corpus jurisdiction.

"Since *Frank v. Mangum*, 237 U. S. 309, 331, 59 L. Ed. 969, 981, 35 S. Ct. 582, this Court has recognized that habeas corpus in the Federal courts by one convicted of a criminal offense is a proper procedure 'to safeguard the liberty of all persons within the jurisdictions of the United States against infringement through any violation of the Constitution,' even though the events which were alleged to infringe did not appear upon the face of the record of his conviction. This opportunity for an examination into the 'very truth and substance of the causes of his detention' was said in the *Frank* case to have come from the adoption in 1867 [February 5] of a statute which empowered Federal courts to examine into restraints of liberty in violation of the Constitution of the United States. 14 Stat. 385, c. 28. The legislation enlarged for the Federal courts the 'bare legal review' of the authority under which a petitioner was held which had been previously afforded by habeas corpus. *Johnston v. Zerbst*, 304 US 458, 465-467, 82 L. Ed. 1461, 1468, 58 S. Ct. 1019, 146 ALR 357. See also *Re Neagle* (*Cunningham v. Neagle*), 135 US 1, 69-76, 34 L. Ed. 55, 73-76, 10 S. Ct. 658; *MacNally v. Hill*, 293 US 131, 79 L. Ed. 238, 55 S. Ct. 24.

This liberalization of habeas corpus required Federal courts when the issue was presented, to examine whether a conviction occurred under such influence by mob spirit as to deny due process, *Frank v. Mangum*, *supra* (237 US 331, 335, dissent 347, 59 L. Ed. 981, 983, 988, 35 S. Ct. 582). The power was called into play a few years later to examine a state conviction under alleged community coercion and this Court said that if the facts set out were true, that the trial would not support conviction. *Moore v. Dempsey*, 261 US 86, 67 L. Ed. 543, 43 S. Ct. 265. In *Mooney v. Holohan*, 294 US 103, 112, 79 L. Ed. 791, 794, 55 S. Ct. 340, 98 ALR 406, it was declared that the knowing use of material perjured testimony by a state prosecutor would make a trial unfair within the meaning of the Fourteenth Amendment.



When the absence of counsel at a trial was urged as a ground for a Federal writ of habeas corpus, we held that in Federal courts a felony conviction without benefit of counsel is subject to collateral attack because a violation of the accused's constitutional right to the service of an attorney unless he has intelligently waived that privilege. *Johnston v. Zerbst*, *supra*; *Walker v. Johnson*, 312 US 275. The same is true in instance of coercion. *Waley v. Johnston*, 316 US 101.

In state prosecutions a conviction on a plea of guilty, obtained by a trick, *Smith v. O'Grady*, 312 US 329, or, after refusal of a proper request for counsel, because of the accused's incapability adequately to defend himself, *Williams v. Kaiser*, 323 US 471, 472, will not support imprisonment. Such procedure violates the Fourteenth Amendment to the Constitution. See *Tompkins v. Missouri*, 323 US 485; *Cochran v. Kansas*, 316 US 255. That Amendment is violated also when a defendant is forced by a state to trial in such a way as to deprive him of the effective assistance of counsel. *Powell v. Alabama*, *supra*; *House v. Mayo*, 324 US 42. Compare *Ex Parte Hawk*, *supra*, 321 US 114; *Glasser v. United States*, 315 US 60, 69, 70."

It will be particularly noted that in all of the foregoing cases discussed in *Hawk v. Olsen*, *supra*, that it was considered that habeas corpus would issue even though attacking collaterally the judgment of a court of competent jurisdiction. The appropriate inquiry is not whether the court whose judgment is thus reviewed is one of competent jurisdiction, but whether a constitutional safeguard, fundamental and basic to a fair trial has been trespassed.

"... if it be found that the court has no jurisdiction to try the petitioner, or that in its proceeding his constitutional rights have been denied, the remedy of habeas corpus is available." *Howen v. Johnson*, 306 U. S. 19, 24 (Hughes, C. J.).

"... the use of the writ in the federal courts to contest the validity of a conviction for crime is not re-

stricted to those cases where the judgment of conviction is void for want of jurisdiction of the trial court to render it. It extends also to those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused . . . ."

" . . . the writ is available when the petitioner has exhausted his state remedies, and . . . he makes a substantial showing of a denial of a federal right."

*Ex parte Hawke*, 321 U. S. 114, 118.

" . . . the Court no longer fictionalizes in an effort to conform situations to the terms of an outmoded precept of jurisdiction; but, squarely attacks the constitutional points in issue as such." Note, 61 Harvard Law Rev. 657, 661.

In a thorough and systematic review of the principles of federal habeas corpus, the District of Columbia Court of Appeals declared in *Dorsey v. Gill*, 148 F. 2d 857, 871-2, cert. den. 325 U. S. 890, that the petitioner can attack a judgment of conviction collaterally "by showing either that the court had no jurisdiction to try the petitioner, or that during its proceeding his constitutional rights were so far denied that the court lost jurisdiction."

The appropriate inquiry is, therefore, whether the judgment attacked collaterally by federal habeas corpus is "such a gross violation of constitutional right as to deny to the petitioner the substance of a fair trial."

The jury questions raised upon the instant proceeding are clearly the subject of inquiry on federal habeas corpus, for the constitution of the grand and petit juries are matters which go to jurisdiction in its most literal sense. One commentator has therefore concluded with respect to the right to challenge juries from which Negroes have been excluded:

"If the defendant did not waive his right by failing to assert it at his trial, then it would always be available to him, even by a later application for a writ of habeas corpus." Peters, *op. cit. supra*, at 93.

This conclusion is warranted by the decisions of this Court which hold that the denial to a Negro defendant of his right to a selection of grand and petit jurors without discrimination against his race, would be a violation of the Constitution and laws of the United States." *Delaware v. Neal*, 103 U. S. 370, 394; *Ex parte Virginia*, 100 U. S. 313, 322-3; *Strauder v. West Virginia*, 100 U. S. 303; *Bush v. Kentucky*, 107 U. S. 110, 119; *Norris v. Alabama*, 294 U. S. 587, 589; *Hale v. Kentucky*, 303 U. S. 613; *Pierre v. Louisiana*, 306 U. S. 354, 361; *Hill v. Texas*, 316 U. S. 400, 406. This Court demonstrated its appraisal of the consequence of Negro exclusion from juries even more forcefully in *Smith v. Texas*, 311 U. S. 128, 130; when it declared:

"For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government."

Racial discrimination in the selection of jurors is, so far as this Court is concerned, the type of "gross violation of constitutional right" which founds the remedy of federal habeas corpus. In fact, in *Moore v. Dempsey*, *supra*, one of the factors which rendered the state proceeding a nullity and vulnerable to habeas corpus in the federal courts was, according to Mr. Justice Holmes, the deliberate exclusion of Negroes from the grand and petit juries in that case.

It is true that in *Andrews v. Swartz*, *supra*, this Court, by way of an alternative holding which was in the nature of dicta, treated the foregoing jury question as one which could not be raised by federal habeas corpus. But, as has already been indicated, that early case was premised on the obsolete and rejected notion that federal habeas corpus will not issue to attack the judgment of a state court of competent jurisdiction—a notion so thoroughly in conflict

with the line of cases following *Frank v. Mangum, supra*, that it was recently remarked of *Andrews v. Swartz* that "it is doubtful if the cited cases retain full authority today in view of *Johnston v. Zerbst* . . . wherein the Supreme Court held that a trial court would lose jurisdiction, i. e., the power, to try a criminal indictment, if the defendant was denied his constitutional right to assistance of counsel under the Sixth Amendment." *International Longshoremen's & Warehousemen's Union, et al., v. Ackerman et al.*, 82 F. Supp. 65, 116 (D. Haw., Biggs J.). More in accord with the now prevailing view of the function of the federal writ are those recent cases where it was assumed that, if properly raised and preserved, exclusion of Negroes from juries in a state prosecution would be a matter for review in the federal courts by habeas corpus. *Carruthers v. Reed*, 102 F. 2d 933 (C. A. 8), cert. den. 307 U. S. 643; *Johnson v. Sanford*, 167 F. 2d 738 (C. A. 5); see also *Burroughs v. Sanford*, 52 F. Supp. 919 (N. D. Ga.).

## II

### **The Writ of Habeas Corpus Is Available to Petitioner under the Procedural Circumstances Which Obtain in the Instant Case.**

In the 1948 recodification of the Judicial Code, statutory limitations were imposed upon federal habeas corpus proceedings wherein a judgment of conviction of a state court is attacked collaterally. Act of June 25, 1948, c. 646, Section 1, 62 Stat. 967. Those limitations appear in Section 2254 of Title 28 which provides:

"An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the state, or that there is either an absence



of available state corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

An applicant shall not be deemed to have exhausted the remedies available in the courts of the state, within the meaning of this section, if he has the right under the law of the state to raise, by any reasonable procedure, the question presented."

It cannot be denied that under the laws of the State of North Carolina and the decision of this Court in *Darr v. Burford*, 339 U. S. 200, 70 S. Ct. 587, that petitioner has within the meaning of the foregoing section "exhausted the remedies available in the courts of the State." Following his conviction in the Superior Court of Bertie County, petitioner's case went to the Supreme Court of North Carolina in orderly appeal (Gen. Stat. of North Carolina, 1943, Sec. 1-270). Upon affirmance of the sentence of the Superior Court by the Supreme Court of North Carolina, petitioner applied to this Court for writ of certiorari, which was denied without opinion (*Raleigh Speller, Petitioner, v. State of North Carolina*, 71 S. Ct. 18). In cases like the instant case, the State of North Carolina does not make available the writ of habeas corpus. Section 17-4 of the General Statutes of North Carolina (1943) specifies:

"Application to prosecute the writ shall be denied in the following cases: . . . .

"2. Where persons are committed or detained by virtue of the final order, judgment or decree of a competent tribunal of civil or criminal jurisdiction, or by virtue of an execution issued upon such final order, judgment, or decree."

It will be noted that the statute does not merely require that the writ be denied in the cited circumstances, but that the application to prosecute the writ shall be denied, and the Supreme Court of North Carolina has so construed it.

*In re Taylor*, 229 N. C. 297, 49 S. E. (2d) 749; *Howie v. Spittle*, 156 N. C. 180, 72 S. E. 207; *In re Holley*, 154 N. C. 163, 69 S. E. 872.

In view of the position taken by the District Court and the great probability that the procedural history of the instant case may have been of overbalancing significance in the conclusion reached by the Court, it may well be queried, for purpose of answer herein, whether the procedural history of petitioner's case could or should have had any bearing upon the merits of the case in the instant habeas corpus proceeding. It is to this query that the immediately following paragraphs will be addressed.

This question seems to be the offspring of the confusion which is said to exist with respect to the issue posed, namely, the effect of the denial of certiorari by this Court where application therefor is made subsequent to a denial of relief by the state court. Before undertaking a discussion of what this Court itself has said that a denial by it of certiorari imports, or, rather, does not import, it may be well to set out two possible different procedural situations in connection with which the question may be posed for the purpose of evaluating the confusion which is said to exist. First, there is the situation, as in the instant case, where this Court denies certiorari upon application for such writ after an orderly and normal appeal to the State Supreme Court has been taken; secondly, there is the situation where this Court denied certiorari sought after a denial by the state court of a petition for writ of habeas corpus, where orderly state appeal procedure has theretofore been likewise followed. Thus, it may be queried, conceding for the purpose that the denial of certiorari may have some significance, whether the denial of certiorari in the instance of application for such writ following a simple, orderly appeal to a state court, has the same effect and significance as the denial of certiorari in the instance upon application for

such a writ from a denial of a state of a petition for habeas corpus. It appears that in the cases in which there has been some intimation that a district court might be to some extent influenced by denial of certiorari, that the denial of certiorari was in instances of the second type hereinbefore referred to, namely, where there was an application for habeas corpus. See *White v. Ragen*, 324 U. S. 760; *Ex parte Hawke*, 321 U. S. 114. However, no case of the procedural comparison of the instant case has been found in which it has been even intimated that the denial of certiorari by this Court upon application therefor following denial of relief by the state court upon a normal, orderly appeal, imports any opinion by this Court upon the merits of the case involved; as a matter of fact, in an unwavering line of decision, in which occasion has been had to discuss the matter, this Court has unmistakably and impatiently expressed the contrary. *State of Maryland v. Baltimore Radio Show*, 70 S. Ct. 252; *Darr v. Burford*, 339 U. S. 200; *Agoston v. Commonwealth of Pennsylvania*, 71 S. Ct. 9; *House v. Mayo*, 324 U. S. 42. In *State of Maryland v. Baltimore Radio Show*, *supra*, after going into great detail as to why the denial of certiorari by this Court imports nothing with respect to the merits of a given case, Mr. Justice Frankfurter said, at 255:

"Inasmuch, therefore, as all that a denial of a petition for writ of certiorari means is that fewer than four members of the court thought it should be granted, this court has vigorously insisted that such a denial carries with it no implication whatever regarding the court's views on the merits of a case which it has declined to review. The Court has said this again and again; again and again the admonition has to be repeated."

Although, as was hereinbefore said in attempting to distinguish two possible procedural situations, a few of the cases appear to intimate that a denial of certiorari after the denial by a state court of a petition for habeas corpus may be ac-

cepted by the district court as being of some weight in a subsequent application for habeas corpus in a district court, this Court appeared to dispel even this possible interpretation of such cases in *House v. Mayo, supra*. In the *House* case, the petitioner had been convicted by the state trial court; on appeal to the Florida Supreme Court his conviction was affirmed; subsequently he filed several petitions for habeas corpus in the state supreme court, which were denied; from the denial of one of said petitions for habeas corpus by the Florida Supreme Court, he applied for certiorari to this Court, which application was also denied. In reversing the district court and the circuit court of appeals for refusing to entertain petitioner's application for writ of habeas corpus, this Court said, at 47-48:

"The district court also referred to a denial by this Court of a petition for certiorari, filed here after denial by the Florida Supreme Court of one of the applications for habeas corpus. See *House vs. Mayo*, 322 U. S. 710, 88 L. Ed. 1553, 64 S. Ct. 1058. The district court thought that this was an expression 'of the opinion that no meritorious question is presented by the matters of which petitioner here complains.' But as we have often said, a denial of certiorari by this court imports no expression of opinion upon the merits of a case (citing decisions)."

It would seem to be anomaly to say that petitioner must apply, as part of exhaustion of state remedies, for certiorari to this Court before seeking habeas corpus in a district court and, at the same time, say that, if his application for certiorari is denied, such denial is an importation by this Court that petitioner's case lacks sufficient merit so that a petition for habeas corpus need not be entertained by the district court, for such a state of affairs would compel petitioner to resort to an undertaking which would in effect withdraw from him his only opportunity for federal review of federal



rights claimed. It would appear that the expansion of federal jurisdiction in habeas corpus was designed to insure that a petitioner who claims violation of federal rights would at some stage of proceedings involving him have unequivocal federal review of his case on the merits thereof. See Dobie, *Habeas Corpus in the Federal Courts*, 13 Virginia Law Rev. 433, 444, 446; Note, *The Freedom Writ—The Expanding Use of Habeas Corpus*, 61 Harvard Law Rev. 657, 659. In his article entitled “*Limiting the Abuse of Habeas Corpus*,” 8 FRD 171, 178, Parker, Chief Justice of the Fourth Circuit, after referring to some of the abuses designed to be eliminated by the revision of federal habeas corpus jurisdiction, none of which, it may be pointed out, obtains in the instant case, said:

“There is preserved in full the right of persons imprisoned under judgments of state and federal courts to ask release on the grounds that they have been denied the sort of trial guaranteed by the Constitution . . . .”

In the final analysis, the law and statements of the law herein set out, as applied to the instant case, warrant, it is submitted, the conclusion that the fact that this Court denied petitioner's application for certiorari following an appeal to the North Carolina Supreme Court imports nothing with respect to this Court's opinion of the merits of petitioner's case, in no wise withdraws from a federal court the jurisdiction to consider his case upon the merits, nor substantiated the District Court's and Court of Appeals' refusal to entertain his case upon the merits thereof.

## III

**The Facts in Evidence in the Instant Case Establish That Petitioner Was Denied Equal Protection of the Laws in His Trial in the State Court, in Violation of the Federal Constitution Through Arbitrary Exclusion of Negroes from Juries in Vance County Solely on Account of Race.**

Little doubt can exist upon the instant record, it is submitted, that over the years Negroes have been purposefully excluded from juries in Vance County, solely for reasons of race. The record reveals that although Negroes comprised 42.4% of the total population of Vance County 21 years of age and over (R. 88), and approximately 38% of the taxpayers appearing on the 1948 tax list, a similar proportion having presumably existed in prior years, up to and including the trial of petitioner (R. 88, 98), it is undisputed that within the memory of witnesses fifty years of age and over no Negro had ever served on a grand or petit jury in Vance County (R. 40-41, 56, 64, 72, 76, 81-82). It is inconceivable in the present state of the law and known facts that this situation is the result of anything other than a studied and purposeful plan of denying to Negroes representation on Vance County juries, solely on grounds of race.

It is clearly apparent from the instant record that two reasons in particular have contributed to the absence of Negroes from juries in Vance County; First, the small percentage of Negroes on the jury list compiled by the jury commissioners (R. 89, 97-98); and, second, a system of marking scrolls containing the names of Negroes so that even those few placed on the jury list and in the jury box may be passed over in the actual selection of a jury (R. 66-68, 69, 72-73, 78, 79).

According to inquiry made and stipulation of Counsel, the jury box of Vance County, from which was drawn the jury which convicted petitioner, contained the names of 2,126

persons, of whom only 145 persons were Negroes (R. 89, 97-98). Negroes, therefore, although comprising 42% of the adult population and 38% of the taxpayers, as aforesaid, constituted only about 6% of the Vance County jury list, with none of this six per cent having ever served on a jury in Vance County. It is apparent that either no thought was given to the inclusion of Negroes on jury lists in Vance County, as required by law, or the exclusion of Negroes from such juries was purposeful, either of which situations has resulted in infraction of rights guaranteed by the Federal Constitution. The evidence in the instant record reveals that H. M. Robinson, Clerk to the jury commissioners for eighteen years or more, prepared the jury lists in Vance County, including the one from which the jury was drawn which convicted petitioner, without being given any guiding instructions by the jury commissioners, upon whom the law imposed the primary duty and responsibility of seeing to it that jury lists in Vance County were properly constituted (R. 38, 53-55, 61, 63-64, 65, 67, 71, 74, 75, 79). It is further apparent from the record that although the 1948 tax list, from which the jury list involved in the instant proceeding was prepared, contained the names of approximately 8,000 names, 3,000 of whom were Negroes, the said H. M. Robinson arbitrarily and, as he testified, without any basis or criteria, selected the names of only 2,126 persons, including therein the names of only 145 Negroes (R. 36-38, 48-50, 51-55, 98). In the face of such overwhelming evidence of discrimination, the denial by the jury commissioners of any intent to discriminate is unavailing, for otherwise the Fourteenth Amendment would be "but a vain and illusory requirement." *Norris v. Alabama*, 294 U. S. 587, 598.

That exclusion of Negroes from juries solely because of race deprives a Negro defendant of the equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution, is so well established that cita-

tion of authority is hardly required. In addition to the discrimination made out by the history of service of Negroes on juries in Vance County, and the statistics and percentages prepared and compiled during the instant hearing (R. 88), it is apparent that yet another basis exists to taint fatally the jury system in Vance County, of which the petitioner herein complains. The jury commissioners of Vance County, in addition to abandoning the preparation of jury lists to the sole and arbitrary discretion of the Clerk to the board, in going over the list prepared by the Clerk uniformly rejected as jurors persons whom they did not personally know (R. 63, 66, 71). Moreover, although said commissioners admittedly had knowledge of only a portion, and sometimes, a very small portion, of the persons whose names were placed on the jury lists, they made no investigation to ascertain the qualifications of persons whom they did not personally know (R. 63, 66, 75-76); at no time did any of the members of the jury commission consult with persons in the Negro community to ascertain qualifications for service as jurors in Vance County of Negroes who possessed the necessary moral and intelligence qualifications (R. 63, 66, 71, 75-76). *Cassell v. Texas*, 339 U. S. 282, 287-289, and *Ward v. Texas*, 316 U. S. 400, 404, give undisputed authority to the proposition that such behavior is fatal to a claim of lack of discrimination.

Although much weight was placed by the respondent upon the alleged purge of the Vance County jury box in July, 1949, this purge was no different from purges over past years, for the jury commissioners testified during petitioner's trial in the Bertie County Superior Court that the names of Negroes have always been in the jury box.<sup>2</sup> The result is that the jury box in Vance County

<sup>2</sup>Record of Trial in Superior Court of Bertie County, North Carolina, pages 17, 33-34, 42, which Record is an Exhibit in the instant proceeding.



was constituted in July, 1948, just as it was in prior years, and in a manner which discriminated against Negroes, as hereinbefore set out. The exclusion of even the few Negroes whose names have appeared in the jury box over the years, was achieved by the commissioners through the placing of an identifying mark on the scrolls that contained the names of Negroes. Although the commissioner's denied the purpose of the marking, there could be no doubt that the same was for the purpose of and was used in conjunction with the other means used to exclude Negroes from Vance County juries. As this Court said, in *Smith v. Texas*, 311 U. S. 128, 132, the federal constitution outlaws jury discrimination whether they are accomplished "ingeniously or ingenuously."

### Conclusion

Petitioner submits, therefore, that on the law and facts herein obtaining, the District Court was in error in denying his petition for writ of *habeas corpus*, and the Court of Appeals was in error in affirming said ruling, and that, therefore, the rulings of said Courts should be reversed.

Respectfully submitted,

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OCTOBER TERM, 1952

~~No. 271, Misc.~~

RALEIGH SPELLER  
PETITIONER,

VS.

ROBERT A. ALLEN, WARDEN OF THE CENTRAL  
PRISON OF NORTH CAROLINA,  
RESPONDENT.

BRIEF OF ROBERT A. ALLEN, WARDEN OF THE CENTRAL  
PRISON, RESPONDENT, OPPOSING PETITION FOR  
WRIT OF CERTIORARI.

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IN THE  
Supreme Court Of The United States

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OCTOBER TERM, 1951

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No. 274, Misc.

RALEIGH SPELLER  
PETITIONER,

VS.

ROBERT A. ALLEN, WARDEN OF THE CENTRAL  
PRISON OF NORTH CAROLINA,  
RESPONDENT.

---

BRIEF OF ROBERT A. ALLEN, WARDEN OF THE CENTRAL  
PRISON, RESPONDENT, OPPOSING PETITION FOR  
WRIT OF CERTIORARI.

---

STATEMENT OF THE CASE

The petitioner, Raleigh Speller, has applied to this Court for a writ of *certiorari* for the purpose of having the Court review a decision of the United States Court of Appeals for the Fourth Circuit, the same being No. 6331, decided November 5, 1951, 192 Fed. (2d) 477.

There is filed in this cause as a part of the record in the Federal District Court the record on appeal to the Supreme Court of North Carolina from the Bertie County Superior Court. There is also a transcript of evidence elicited in the Federal District Court in this *habeas corpus* proceeding. Throughout this brief we will refer to the record in the State Court as "S. R." and to the transcript of evidence in the Federal Court as "F. Tr."

The petitioner, a Negro, was thrice tried, convicted and sentenced to death in the Superior Court of Bertie County, North Carolina, for the crime of rape of Mrs. Aubrey Davis, a white woman of about 50 years of age, and subsequently appealed from each of said convictions to the Supreme Court of North Carolina, which appeals are reported as *STATE v. SPELLER*, 229 N. C. 67, 47 S. E. (2d), 537; *STATE v. SPELLER*, 230 N. C. 345, 53 S. E. (2d), 294; and *STATE v. SPELLER*, 231 N. C. 549, 57 S. E. (2d), 759. On the first appeal, the indictment found at the August, 1947, Term of Bertie County Superior Court and the subsequent trial and conviction at the November Term, 1947, of said Court were set aside and petitioner granted a new trial because of jury defect. On the second appeal, the trial and conviction at the November Term, 1948, of said Court, on a bill of indictment returned at the August Term, 1948, by a Grand Jury consisting of members of both the white and Negro races, was set aside and a new trial granted for failure to allow the petitioner sufficient time or opportunity to present his challenge to the array. The validity of the second bill of indictment is not challenged. On the third appeal, the petitioner's conviction at the August Term, 1949, of said Court was affirmed by the North Carolina Supreme Court. Petitioner then attempted to have his case reviewed by petition for *certiorari* filed in the Supreme Court of the United States. This application was dismissed, *SPELLER v. NORTH CAROLINA*, 340 U. S. 835, 71 S. Ct. 18, 95 L.Ed. 613. This denial was without any dissent. Petitioner then filed a petition for a writ of *habeas corpus* in the District Court of the United States for the Eastern District of North Carolina. The writ was granted. After hearing evidence on the question presented and deciding that petitioner's position was without merit, the writ of *habeas corpus* theretofore issued was vacated and the petition dismissed on the ground that upon the procedural history of the case the petitioner was not entitled to the writ. The opinion of the District Judge is reported as *SPELLER v. CRAWFORD*, 99 F. Supp. 92. From this decision petitioner appealed to the United States Court of Appeals for the Fourth Circuit, which Court, in a *per curiam* opinion,

SPELLER v. ALLEN, C. C. A. 4, No. 6331, decided November 5, 1951, 192 Fed. (2d) 477, affirmed the action of the District Court.

## QUESTION INVOLVED

Appellee submits that the question involved on this appeal should be stated as follows:

1. Where, on a criminal trial in the State Court, the petitioner has challenged the constitution of the Petit Jury on the constitutional grounds that Negroes have been arbitrarily and systematically excluded by reason of race and color from the Petit Jury of the county, and this issue determined adversely to the petitioner in the State Court, and *certiorari* having been denied by the Supreme Court of the United States, can this constitutional issue again be retried in a *habeas corpus* proceeding in the Federal District Court?

## FACTS

The petitioner was indicted for the capital crime of rape under section 14-21 of the General Statutes of North Carolina, which reads as follows:

"Punishment for rape.—Every person who is convicted of ravishing and carnally knowing any female of the age of twelve years or more by force and against her will, or who is convicted of unlawfully and carnally knowing and abusing any female child under the age of twelve years, shall suffer death. Provided, if the jury shall so recommend at the time of rendering its verdict in open court, the punishment shall be imprisonment for life in the state's prison, and the court shall so instruct the jury."

When this case was called for trial at the August term, 1949, of the Bertie County Superior Court, the trial Judge, in compliance with the defendant's motion, ordered "that a special venire from Vance County (Vance County being in the same judicial district as Bertie County) be summoned by the Sheriff of Vance County to attend at the courthouse at Windsor N. C., at 10:30 A. M., on the 31st day of August,



1949, to serve as jurors in said action" and ordered "the Clerk of the Board of County Commissioners of Vance County to cause one hundred scrolls to be drawn from Box No. 1 by a child under ten years of age and the names so drawn shall constitute the special venire; and the Clerk of the Superior Court of Vance County shall insert their names in a writ of venire and deliver the same to the sheriff of Vance County, and the persons named in the writ, and no others, shall be summoned by the sheriff of Vance County to be and appear at the courthouse in Windsor in Bertie County at 10:30 A. M., on the 31st day of August, 1949." "That the said venire shall be drawn as aforesaid in the presence of the defendant, Raleigh Speller, and at least one of his attorneys, and the solicitor of this judicial district at 4:30 P. M., on the 29th day of August, 1949" (S. R. 10, 11 and 12).

Pursuant to the mandate of Section 9-1 of the General Statutes of North Carolina, the Board of County Commissioners for Vance County, at its July, 1949, meeting purged the jury boxes of said county by taking out and destroying all of the scrolls in said boxes and by making up a new jury list and placing in jury box No. 1 the names of persons who were residents and taxpayers of said county, who had paid their taxes for the preceding year, and who were persons of good moral character and qualified to serve as jurors, all free of any racial discrimination. (S. R. 32-33).

The record reveals that the special venire in this case was the first list of jurors drawn from the jury box after it was purged in July, 1949. (S. R. 23).

No challenge was made to the Grand Jury that found the bill of indictment nor was motion made to quash the indictment. After having been arraigned and having entered a plea of not guilty, petitioner, for the first time, challenged the entire array of Petit Jurors and special veniremen summoned from Vance County. This challenge was based on the grounds that the officers, whose duty it was to prepare the jury lists and draw the panels to be summoned by the sheriff, purposefully and systematically discriminated against members of the Negro race, of which the petitioner is one, by excluding Negroes from jury lists

and panels solely and wholly because of their race and/or color, thereby violating the petitioners' right to a fair and impartial trial by his peers as guaranteed under the Constitution and Laws of the State of North Carolina and the Fourteenth Amendment to the Constitution of the United States. (S. R. 12 and 13).

Upon the petitioner's challenging the array of petit jurors and moving the Court that the entire array of special veniremen be quashed and set aside, the trial Court caused to be issued a subpoena *duces tecum* to the Chairman of the Vance County Board of Commissioners, the Clerk of said Board, the Clerk of Superior Court, the County Tax Collector and the Sheriff, all of Vance County, requiring them to bring in Court their several records pertaining to the listing, drawing and summoning of jurors in Vance County and the jury boxes and records pertaining thereto. (S. R. 13 and 14).

When said witnesses, records, and jury boxes had been brought into the Court, the defendant was given an opportunity to present evidence in support of his motion that the array of petit jurors and special veniremen summoned from Vance County be quashed and set aside. The petitioner presented several witnesses who testified as to the manner and method of the drawing of the special venire.

After the hearing *voir dire* the Court made a full and complete findings of fact (S. R. 57-63) and overruled or dismissed the motion of challenge to the array of petit jurors and the cause was duly tried by a jury drawn from a panel containing members of the Negro race, which returned a verdict of guilty of rape in the first degree without recommendation of mercy. Upon the conclusion of the hearing as to the alleged discrimination, counsel for both the defendant and the State announced that they did not care to offer further evidence. (S. R. 56). The Court inquired of counsel for the defendant and State if they cared to be heard on their motions and they responded that they did not care to be heard. (S. R. 56 and 57). Counsel for the defendant at no time thereafter renewed his request to be allowed to proceed to examine other scrolls nor did he

tender other witnesses who would testify as to any irregularities concerning the scrolls in the box.

The evidence in this case is of such sordid, revolting and repulsive nature that it will not be set out in detail except to the extent necessary to enable the Court to obtain a true picture of the commission of the crime upon which the petitioner was convicted.

The defendant offered no evidence (S. R. 121) but the State's evidence discloses that Mrs. Aubrey Davis, a woman of 52 years of age, and her totally deaf husband resided alone on the Williamston highway No. 70, about one mile south of the town. On the night of Friday, July 18th, 1947, about 10:30, her husband was asleep and she had undressed but before going to bed went to her back door to fasten it. Upon finding that the lock was broken and the hook bent she went on the back porch to get a hammer to straighten it. As she turned to re-enter the hall door she was rushed upon and dragged into the back yard by the petitioner. In his efforts to quieten her screams, he choked and savagely beat her about the face and body, and finally criminally assaulted her by having sexual intercourse with her forcibly and against her will and, upon consummation of the crime, left her in a critical condition. (S. R. 63, 64, 65, 66, 67 and 77).

Two buttons and some wearing apparel were found at the spot where the crime was committed. When the petitioner was found in a filling station some six hundred yards from the Davis home he was sitting in a chair with his head in his hands, his face scratched and bleeding, and wet with perspiration; his shirt was torn with two buttons missing and upon comparison the buttons found at the scene of the crime were shown to be identical with the remaining buttons on his shirt. (S. R. 92, 93, 94, 96 and 97). When the petitioner was questioned about his torn clothes and the scratches on his face, he replied: "If you are talking about the deaf man's wife, I am the man, but I did not mean to hurt her." (S. R. 95). Mrs. Davis identified the petitioner as her assailant. (S. R. 66).

## ARGUMENT

## I.

THE MERE FACT THAT A STATE COURT DECIDES CONSTITUTIONAL QUESTIONS IN A CRIMINAL TRIAL DOES NOT WARRANT THE REVIEW OF SUCH DECISIONS IN A HABEAS CORPUS PROCEEDING IN THE FEDERAL COURTS.

Cases dealing with *habeas corpus* in Federal Courts to question State action show that the Federal Courts have imposed severe limitations upon the matters that will be reviewed in such a proceeding. One such limitation is that the mere existence of a constitutional question as to the correctness of a decision of a State Court is not enough to justify the use of the writ of *habeas corpus*. Petitioner, however, all through his brief seems to assume that because a constitutional issue or question was presented in the criminal trial in the State Court and was decided by that Court, he is automatically entitled to review of such question on *habeas corpus* in the Federal Court. We think this is an erroneous viewpoint and that the mere existence of a constitutional question, because of the correctness of a decision of a State Court, is not enough to justify the use of the *habeas corpus* proceeding. In the case of *EURY v. HUFF*, 4 Cir., 141 Fed. (2d) 554, 555, on this same question, Judge Parker, speaking for the Court, said:

"In addition to this, the question was one that could have been raised only in the original cause and not collaterally by petition to be released on habeas corpus. *Riddle v. Dyche*, 262 U.S. 333, 43 S.Ct. 555, 67 L.Ed. 1009. A prisoner does not show right to release on habeas corpus merely by showing error on his trial, even though this involves a violation of constitutional right. To entitle him to release on habeas corpus there must have been such 'gross violation of constitutional right as to deny (to the prisoner) the substance of a fair trial and thus oust the court of jurisdiction to impose sentence.' *Sanderlin v. Smyth*, 4 Cir., 138 F. 2d 729, 731. In the case cited, we laid down with some care the rules applicable to the issuance of the writ of habeas corpus in the case of a prisoner held under



the judgment of a state court. The same rules are applicable in the case of a prisoner held under the judgment of a federal court, except, of course, that the rules as to the exhaustion of state remedies do not apply."

In the case of *GLASGOW v. MOYER*, 225 U.S. 420, 56 L. ed. 1147, this Court discusses the function of the writ of *habeas corpus* when reviewing State action, and, especially when the issues are constitutional, and the Court said:

"The principle is not the less applicable because the law which was the foundation of the indictment and trial is asserted to be unconstitutional or uncertain in the description of the offense. Those questions, like others, the court is invested with jurisdiction to try if raised, and its decision can be reviewed, like its decisions upon other questions, by writ of error. *The principle of the cases is the simple one that if a court has jurisdiction of the case the writ of habeas corpus cannot be employed to re-try the issues, whether of law, constitutional or other, or of fact.*" (Emphasis supplied).

In the case of *GRAHAM v. SQUIER*, 9 Cir., 132 Fed. (2d) 681, the petitioner contended that he was automatically entitled to a writ of *habeas corpus* if any of his constitutional rights had been denied, and for this authority, he cited the case of *BOWEN v. JOHNSTON*, 306 U. S. 19, 23, 24, 83 L. ed. 455. The petitioner further called attention to an excerpt in *Corpus Juris* which stated that if evidence was secured by a violation of the defendant's constitutional rights, this would be a ground for the issuance of the writ. In disposing of these contentions, the Court said:

"Petitioner relies upon the case of *Johnson v. Zerbst*, 304 U.S. 458, 465-467, 58 S.Ct. 1019, 82 L.Ed. 1461; and upon the case of *Bowen v. Johnston*, 306 U.S. 19, pages 23, 24, 59 S.Ct. 442, page 444, 83 L.Ed. 455, from which he quotes:

"The scope of review on habeas corpus is limited to the examination of the jurisdiction of the court whose judgment of conviction is challenged. (Cases cited.) But if it be found that the court had no jurisdiction to try the petitioner, or that in its proceedings his

*constitutional rights have been denied*, the remedy of habeas corpus is available.'

"In the above quotation the clause italicized is stressed by petitioner, and is particularly relied upon by him because, as hereinbefore stated, it is his contention that at the trial one of his constitutional rights—the guaranty against self-incrimination, as declared by the Fifth Amendment—had been transgressed. Petitioner urges that this Bowen case, 'holds that the writ is available when constitutional rights have been denied as well as when jurisdiction is lacking.'

"The language of the emphasized clause in the excerpt from the Bowen case, considered in and of itself and isolated from the text of which it is a part, might seem to indicate, as petitioner would have it, that whenever *any* constitutional right is infringed in a criminal trial, the accused, if he be convicted, may thereafter nullify the judgment by bringing a habeas corpus proceeding. But taking that clause, as is obviously necessary in order to arrive at the true meaning, in conjunction with the statements of the Supreme Court contained in the very same paragraph, and which express the unvaried rule that a criminal action may be collaterally attacked on *jurisdictional* grounds alone, one sees immediately that the Supreme Court intended no more than that the writ of habeas corpus should issue only in those cases where the denial of the constitutional rights of the accused operated to prevent the trial court from acquiring jurisdiction over the person of the accused, or if jurisdiction did exist at the commencement of the trial, operated to destroy that jurisdiction at some stage during the progress thereof. That this interpretation of the Supreme Court's language is correct will appear from an examination of the sustaining authorities, which are cited in the case immediately following the clause under discussion.

"Petitioner calls to our attention the following statement, excerpted from 29 Corpus Juris at page 47:

"'But a conviction upon evidence secured by violation of defendant's constitutional rights, may afford ground for the writ.'

"That statement is supported by the single case of *In re Horschler*, 116 Misc. 243, 190 N.Y.S. 355. There the New York court held that when a defendant is

convicted of illegally possessing liquor upon evidence secured through illegal search and seizure, he is entitled to a writ of habeas corpus. Most of the opinion in the case is devoted to ascertaining whether there had been an illegal search and seizure, and when the court arrived at the determination that such had been the case, it concluded summarily that the writ should issue, without an explication as to the purposes and functions of a writ of habeas corpus. It may be that by constitutional provision or by statutory authorization the New York courts are empowered to grant the writ under circumstances such as those existing in the Horschler case; but the matter has been decided to the contrary so far as the federal courts are concerned."

## II.

THE ISSUE/AS TO WHETHER OR NOT PERSONS OF THE NEGRO RACE WERE UNCONSTITUTIONALLY EXCLUDED FROM THE PETIT JURY WAS PASSED UPON BY THE STATE TRIAL COURT ADVERSELY TO THE PETITIONER AND THIS ISSUE CANNOT NOW BE QUESTIONED OR RETRIED IN A HABEAS CORPUS PROCEEDING.

There is no contention by petitioner that the Superior Court of Bertie County is not a Court of general jurisdiction (G.S. 7-63) or that the Court was without jurisdiction to try persons charged with rape as defined (G.S. 14-21) by the North Carolina statute. We, therefore, say that the Superior Court of Bertie County had jurisdiction, and had a right to decide every question occurring in the case, including the organization and qualification of the petit jury, whether the decision was correct or incorrect, and the proceedings in the Superior Court of Bertie County are not subject to collateral attack by the means of a writ of *habeas corpus* for the reason set forth in the petition, that is, a charge of unconstitutionality in the selection of the Petit Jury of said Court because of racial discrimination.

In the first section of this brief, we set out matters for which *habeas corpus* is not available as a method of review. We propose now to show that the authorities support

the proposition that racial discrimination in the selection of jurors for a Petit Jury is considered to be an irregularity and not subject to attack upon a writ of *habeas corpus* in the Federal Court. Briefly, if the Superior Court of Bertie County originally had jurisdiction over the subject-matter and person of petitioner, it did not lose jurisdiction because of any irregularity in the selection of the Petit Jury. It is not contended that the bill of indictment was not found by eligible grand jurors as such, nor is it contended that the petitioner was convicted by a panel of petit jurors who were within themselves ineligible. Indeed, an inspection of the record will show that of the 100 jurors constituting the special venire from Vance County, 7 were members of the Negro race; that 4 of the 7 Negroes so selected reported to Bertie County (S.R. 59, App. to Brief, p. 33, C.C.A. 4, No. 6331), that the 3 who did not report were dead. (App. to Brief, p. 33, C.C.A. 4, No. 6331); that one of the Negroes was examined on his voir dire, but the jury as finally constituted was composed of members of the white race. There were two Negroes serving on the Grand Jury that found the bill of indictment against the petitioner in Bertie County (App. to Brief, p. 29-40, C.C.A. 4, No. 6331), and as previously stated the constitution of the Grand Jury is not here questioned.

The criminal procedure of North Carolina provides for an appeal to the Supreme Court of North Carolina as a matter of right in all criminal cases, and as we have heretofore pointed out, the Supreme Court of North Carolina does pass upon the question of the constitutionality of the constitution of juries, both Grand Juries and Petit Juries, (*STATE v. SPELLER, supra*). In other words, the question the petitioner sought to raise in his petition for *habeas corpus* was a matter that could be and was passed up on the merits by appeal to the Supreme Court of North Carolina. In support of our position that racial discrimination in the selection of Petit Jury is an irregularity and does not cause the trial Court in the State to lose jurisdiction and is not subject to collateral attack on *habeas corpus*, we desire to cite and quote from the following authorities:



IN RE WOOD, 140 U.S. 278, 35 L. ed. 505  
 JUGIRO v. BRUSH, 140 U.S. 370, 35 L. ed. 511  
 ANDREWS v. SWARTZ, 156 U.S. 272, 39 L. ed. 422  
 KAIZO v. HENRY, 211 U.S. 146, 53 L. ed. 125  
 IN RE WILSON, 140 U.S. 575, 35 L. ed. 513  
 EX PARTE MURRAY, 66 Fed. Rep. 297  
 EX PARTE CEASAR, D.C., Texas, 27 Fed. Supp. 690  
 U. S. ex rel. JACKSON v. BRADY, D.C., Md., 47 Fed.  
 Supp. 362.  
 JOHNSON v. WILSON, D.C., Ala., 45 Fed. Supp. 597  
 (Affirmed)  
 JOHNSON v. WILSON, 5 Cir., 131 Fed. (2d) 1)  
 STATE ex rel. PASSER v. COUNTY BOARD, 52  
 A.L.R. 916 (Minn.), Note p. 929  
 HALE v. CRAWFORD, 1 Cir., 65 Fed. (2d) 739  
 EURY v. HUFF, App. D.C., 146 Fed. (2d) 17  
 SCHOLZ v. SHAUGHNESSY, App. D. C., 180 Fed.  
 (2d) 450  
 U. S. ex rel. McCANN v. THOMPSON, 2 Cir., 144 Fed.  
 (2d) 604

In the case of IN RE WOOD, 140 U.S. 278, 35 L. ed. 505,  
 the Court said:

"If the question of the exclusion of citizens of the African race from the lists of grand and petit jurors had been made during the trial in the Court of General Sessions; and erroneously decided against the appellant, such error in decision would not have made the judgment of conviction void, or his detention under it illegal. *Savin, Petitioner*, 131 U. S. 267, 279; *Stallins v. Fuller*, 136 U.S. 468, 478. Nor would that error, of itself, have authorized the Circuit Court of the United States, upon writ of habeas corpus, to review the decision or disturb the custody of the accused by the state authorities. The remedy, in such case, for the accused, was to sue out a writ of error from this court to the highest court of the State having cognizance of the matter, whose judgment, if adverse to him in respect to any right, privilege of immunity, specially claimed under the Constitution or laws of the United States, could have been reexamined, and reversed, affirmed or modified, by this court as the law required. Rev. Stat. § 709."

In the case of *JUGIRO v. BRUSH*, 140 U.S. 370, 35 L. ed. 511, the Court said:

"The statutes of New York regulating these matters do not, in any way, conflict with the provisions of the Federal Constitution; and if, as alleged, they were so administered by the state court, in appellant's case, as to discriminate against him because of his race, the remedy for the wrong done to him was not by a writ of habeas corpus from a court of the United States."

In the case of *IN RE WILSON*, 140 U.S. 575, 35 L. ed. 513, the Court said:

"The response thereto is, that no such act was passed; and that, even if it were, the defect in the number of grand jurors did not vitiate the entire proceedings; so that they could be challenged collaterally on *habeas corpus*, but it was only a matter of error, to be corrected by proceedings in error. It appears from the record that a challenge to the grand jury was made by the petitioner and overruled; but the ground here presented was not taken in such challenge."

In the case of *KAIZO v. HENRY*, 211 U.S. 146, 53 L. ed. 125, the Court said:

"These well-settled principles are decisive of the case before us. Disqualifications of grand jurors do not destroy the jurisdiction of the court in which an indictment is returned, if the court has jurisdiction of the cause and of the person, as the trial court had in this case. *Ex parte Harding*, 120 U.S. 782; *In re Wood*, 140 U.S. 278; *In re Wilson*, 140 U.S. 575. See *Matter of Moran*, 203 U. S. 96, 104. The indictment, though voidable, if the objection is seasonably taken, as it was in this case, is not void. *United States v. Gale*, 109 U.S. 65. The objection may be waived, if it is not made at all or delayed too long. This is but another form of saying that the indictment is a sufficient foundation for the jurisdiction of the court in which it is returned, if jurisdiction otherwise exists. That court has the authority to decide all questions concerning the constitution, organization and qualification of the grand jury, and if there are errors in dealing with these questions, like all other errors of law committed in the course of the proceedings, they can only be corrected by writ of error."

In the case of *ANDREWS v. SWARTZ*, 156 U.S. 272, 39 L. ed. 422, the Court said:

"The further contention of the accused is that he is restrained of his liberty in violation of the Constitution and laws of the United States, in that persons of his race were arbitrarily excluded, solely because of their race, from the panel of jurors summoned for the term of the court at which he was tried, and because the state court denied him the right to establish that fact by competent proof.

"It is a sufficient answer to this contention that the state court had jurisdiction both of the offense charged and of the accused. By the laws of New Jersey the Court of Oyer and Terminer and general jail delivery has 'cognizance of all crimes and offences whatsoever which, by law, are or shall be of an indictable or presentable nature, and which have been or shall be committed within the county for which such court shall be held.' Rev. Stat. N. J. 272, § 30. If the state court, having entered upon the trial of the case, committed error in the conduct of the trial to the prejudice of the accused, his proper remedy was, after final judgment of conviction, to carry the case to the highest court of the State having jurisdiction to review that judgment, thence upon writ of error to this court, if the final judgment of such state court denied any right, privilege, or immunity specially claimed, and which was secured to him by the Constitution of the United States. *Even if it be assumed that the state court improperly denied to the accused, after he had been arraigned and pleaded not guilty, the right to show by proof that persons of his race were arbitrarily excluded by the sheriff from the panel of grand or petit jurors solely because of their race, it would not follow that the court lost jurisdiction of the case within the meaning of the well-established rule that a prisoner under conviction and sentence of another court will not be discharged on habeas corpus unless the court that passed the sentence was so far without jurisdiction that its proceedings must be regarded as void.* *Ex parte Siebold*, 100 U.S. 371, 375; *In re Wood*, 140 U.S. 278, 287; *In re Shibuya Jugiro*, 140 U.S. 291, 297; *Pepke v. Cronan*, 155 U.S. 100. When a state court has entered upon the trial of a criminal case, under a statute not repugnant to the Constitution of the United States, and has jurisdiction of the offense and of the

accused, no mere error in the conduct of the trial should be made the basis of jurisdiction in a court of the United States to review the proceedings upon writ of habeas corpus.

"The application to the Circuit Court for a writ of habeas corpus was properly denied, and the judgment must be Affirmed." (Emphasis supplied)

### III.

#### UPON PETITION FOR WRIT OF HABEAS CORPUS, THE DECISION OF THE FEDERAL COURT IS DIS- CRETIONARY.

There is a long-established line of cases to the effect that where the Federal Court is reviewing by *habeas corpus* action of the State Courts, the Federal Court has a discretion in its decisions in such matters, and then when coupled with the other principle heretofore commented on that it is only in rare and exceptional cases that this discretion will be used in favor of interference in State action, we say that petitioner has failed to allege or show any circumstance which will warrant a writ of *habeas corpus* or his discharge. The matter is well expressed in the case of **LONG v. BENSON**, 6 Cir., 140 Fed. (2d) 195, 196, from which we quote as follows:

"In *United States ex rel. Kennedy v. Tyler*, 269 U.S. 13, 17, 46 S.Ct. 1, 3, 70 L.Ed. 138, it was said: 'The rule has been firmly established by repeated decisions of this court that the power conferred on a federal court to issue a writ of habeas corpus to inquire into the cause of the detention of any person asserting that he is being held in custody by the authority of a state court in violation of the Constitution, laws, or treaties of the United States, is not unqualified, but is to be exerted in the exercise of a sound discretion. The due and orderly administration of justice in a state court is not to be thus interfered with save in rare cases where exceptional circumstances of peculiar urgency are shown to exist. *Ex parte Royall*, 117 U.S. 241, 250-253, 6 S.Ct. 734, 29 L.Ed. 868; *In re Wood*, 140 U.S. 278, 289, 11 S.Ct. 738, 35 L.Ed. 505; *In re Frederick*, 149 U.S. 70, 77, 78, 13 S.Ct. 793, 37 L.Ed. 653; (*People of State of*) *New York v. Eno*, 155 U.S. 89, 98, 15 S.Ct.



30, 39 L.Ed. 80; *Whitten v. Tomlinson*, 160 U.S. 231, 240-242, 16 S.Ct. 297, 40 L.Ed. 406; *Baker v. Grice*, 169 U.S. 284, 290, 18 S.Ct. 323, 42 L.Ed. 748; *Tinsley v. Anderson*, 171, U.S. 101, 104, 105, 18 S.Ct. 805, 43 L.Ed. 91; *Davis v. Burke*, 179 U.S. 399, 401-403, 21 S.Ct. 210, 45 L.Ed. 249; *Riggins v. United States*, 199 U.S. 547, 549, 26 S.Ct. 147, 50 L.Ed. 303; *Drury v. Lewis*, 200 U.S. 1, 6, 26 S.Ct. 229, 50 L.Ed. 343; *Glasgow v. Moyer*, 225 U.S. 420, 428, 32 S.Ct. 753, 56 L.Ed. 1147; *Johnson v. Hoy*, 227 U.S. 245, 27, 33 S.Ct. 240; 57 L.Ed. 497."

There are many other cases to this effect, and we have tried to collect the more important cases as follows:

ASHE v. VALOTTA, 270 U.S. 424, 70 L.Ed. 662  
 IASIGI v. VAN DECARR, 166 U.S. 391, 41 L.Ed. 1045  
 EX PARTE ROYALL, 117 U.S. 241, 29 L.Ed. 868  
 SWIHART v. JOHNSTON, 9 Cir., 150 Fed. (2d) 721  
 JOHNSON v. WILSON, 5 Cir., 131 Fed. (2d) 1, 2  
 EX PARTE MELENDY, 9 Cir., 98 Fed. (2d) 791  
 URQUHART v. BROWN, 205 U.S. 179, 51 L.Ed. 760  
 SANDER v. JOHNSTON, 9 Cir., 11 Fed. (2d) 509

In ASHE v. VALOTTA, *supra*, speaking of the Court's discretion this Court said:

"In so delicate a matter as interrupting the regular administration of the criminal laws of the state by this kind of attack; too much discretion cannot be used."

#### IV.

IN EXERCISING ITS DISCRETIONARY POWERS RELATIVE TO GRANTING OR DENYING HABEAS CORPUS, THE FEDERAL COURT MAY CONSIDER THE ACTION OF THE STATE APPELLATE COURT AND THE DENIAL OF CERTIORARI BY THE SUPREME COURT OF THE UNITED STATES.

In view of the fact that the precise question sought to be raised by the petitioner before the Federal Court has been raised before the Supreme Court of North Carolina and has been decided adversely to him and in view of the denial of *certiorari* by the Supreme Court of the United States, we say that petitioner's case "falls squarely within

the rule that 'a federal district court will not usually re-examine on habeas corpus the questions thus adjudicated.'" ADKINS v. SMYTH, 4 Cir., 188, Fed. (2d) 452, and cases therein cited.

In the opinion below, as well as in ADKINS v. SMYTH, *supra*, the Fourth Circuit in citing from STONEBREAKER v. SMYTH, 4 Cir., 163 Fed. (2d) 498, quoted language appropriately pertinent as follows:

"We are confronted at the outset with the fact that the case presented by petitioner is precisely the same as that in which relief was denied by the Virginia courts and in which certiorari was denied by the Supreme Court of the United States. The rights of petitioners were fully presented in that case and the Virginia courts had full power to grant the relief asked, had they thought petitioner entitled to it. *The facts were fully before the Supreme Court of the United States on certiorari; and proper respect for that court compels the conclusion that if it had thought that the record showed a denial of petitioner's constitutional rights, certiorari would have been granted and petitioner would have been afforded relief.* While action of the Virginia Courts and the denial of certiorari by the Supreme Court were not binding on the principle of *res judicata*, they were matters entitled to respectful consideration by the court below; and in the absence of some most unusual situation, they were sufficient reasons for that court to deny a further writ of habeas corpus. It would be intolerable that a federal district court should release a prisoner on habeas corpus after the State Courts have refused him relief in precisely the same case on a similar writ and the United States Supreme Court has refused to review their action on certiorari. *This would be in effect to permit a federal district court to review the Supreme Court of the United States as well as the highest court of the state. The rule in such cases was stated in the case of White v. Regan, 324 U.S. 760, 764, 765, 65 S.Ct. 978, 981, 89 L.Ed. 1348, relied on by the court below as follows:*

"If this court denies certiorari after a state court decision on the merits, or if it reviews the case on the merits, a Federal District Court will not usually re-examine on habeas corpus the questions thus adjudicated. *Ex Parte Hawk, supra, 321 U.S. 118, 64 S.Ct. 448, 88 L.Ed. 572.*"

"The citation of *Ex Parte Hawk* shows that the court had in mind the use of the words 'will not usually re-examine' in the statement just quoted; for the court had pointed out in that case the sort of cases in which the district court would be justified in granting habeas corpus notwithstanding the denial of certiorari in cases where the state court had refused to grant relief. These were cases where resort to state court remedies had failed to afford a full and fair adjudication of the federal contentions raised either because the state afforded no remedy or because the remedy afforded proved in practice unavailable or seriously inadequate." (Emphasis supplied.)

Judge Parker, who wrote the opinion of the Court below, and who also served as Chairman of the Judicial Conference Committee on Habeas Corpus Procedure, in an Article (*Limiting the Abuse of Habeas Corpus*, 8 F. R. D. 171), outlined the purposes of Title 28, U. S. C., § 2254, as revised, and the abuses it was to correct as follows:

"The thing in mind in the drafting of this section (Title 28, U. S. C. § 2254) was to provide *that review of state court action be had so far as possible only by the Supreme Court of the United States, whose review of such action has historical basis, and that review not be had by the lower federal courts, whose exercise of such power is unseemly and likely to breed dangerous conflicts of jurisdiction.*" (Emphasis Supplied).

"The provisions of the Revised Code with respect to habeas corpus are very largely a mere codification of the best practice already worked out by court decisions. Even so, they are important in clarifying matters which were subject to misunderstanding and in pointing out how the abuses which have arisen in connection with habeas corpus may be avoided. There is preserved in full the right of persons imprisoned under judgments of state and federal courts to ask release on the ground that they have been denied the sort of trial guaranteed by the Constitution, but effective provision is made against the unseemly incidents which have arisen in the assertion of the right. *There will be no more shopping around from judge to judge with the same old case. There will be no more dragging of a judge into court to defend before another judge the procedure of his court. There will be no more cases*

of a federal judge in one district passing upon the validity of proceedings of a federal court in another district on no more substantial basis than the unsupported oath of a convicted felon. And last, but not least, there should be no more cases where proceedings of state courts, affirmed by the highest courts of the state, with denial of certiorari by the Supreme Court of the United States, will be reviewed by federal circuit or district judges. (Emphasis supplied).

"It is believed, that the effect of these provisions of the Revised Code will be to protect the courts in the administration of criminal justice from the delays, harassments and unseemly conflicts of jurisdiction which have arisen under recent habeas corpus decisions, without in anywise impairing the rights which it was the purpose of these decisions to protect. The habeas corpus procedure which led to abuse was laid down by the Supreme Court out of a desire that complete justice be done in every case. The provisions of the Revised Code preserve everything of importance in that procedure while eliminating the abuses to which it has given birth." (Emphasis supplied).

It is respectfully submitted under all the circumstances of the petitioner's case that he had a full and fair adjudication of the federal contentions raised by him before the Supreme Court of the State of North Carolina. There was no failure to afford him same. The procedures of the North Carolina Courts afforded him appellate review as a matter of right on the precise question which he now raises before the Federal Court. The petitioner had his full and fair adjudication there and an additional opportunity before the Supreme Court of the United States. It is respectfully submitted that there must be an end to litigation at some place especially when as in petitioner's case every avenue for relief to which he was entitled was utilized by him. The conclusion of the STONEBREAKER Case is inescapable, if there had been merit in petitioner's contention, certainly relief would have been afforded him at some point.



## V.

PETITIONER IS NOT ENTITLED TO THE RELIEF SOUGHT BY HIM ON THE MERITS OF HIS CASE, SINCE HE HAS NOT SHOWN INTENTIONAL, ARBITRARY AND SYSTEMATIC EXCLUSION OF ELIGIBLE PERSONS OF PETITIONER'S RACE FROM PETIT JURIES IN VANCE COUNTY.

On the merits of his case, both before the North Carolina Courts and the Federal District Court, petitioner has failed to show that there was any discrimination against him or members of his race in the preparation of the jury box, the selection of the special venire, the petit jury that tried him or at any stage from his indictment until final judgment.

An examination of the record in the trial court will show that the petitioner in this case was tried in the State Courts in the same manner as any other defendant of any other race. The trial Court was very patient and cautious and inquired thoroughly into the question of jury discrimination. (S.R. 16-63). From the record there is not the slightest evidence as to any discrimination against the petitioner because of race, but the trial record does strongly indicate and show that, in fact, because of petitioner's race, a much more painstaking and patient research into the facts and details was taken than would probably have been the case of persons of the white race. There is not the slightest indication that the trial court committed any unconstitutional act that caused it to lose jurisdiction. There is not the slightest indication of any violence or mob action; but on the contrary, the trial shows a careful and well-developed hearing, which it is submitted is the very essence of due process of law. There is nothing to show that the judgment of the trial court is invalid. No exceptional circumstances have been shown which would justify a Federal Court in interfering with the administration of justice by a Sovereign State in its own Courts.

The State of North Carolina does not deny that the intentional, arbitrary and systematic exclusion of Negroes from jury service on either the grand jury or the trial panel is an unconstitutional discrimination prohibited by

the *equal protection* and *due process* clauses of the Fourteenth Amendment to the Constitution of the United States and the *law of the land* clause of Article 1, Section 17, of the Constitution of the State of North Carolina, this provision of our State Constitution being equivalent to the *due process of law* clause of the Federal Constitution. Long before the happening of the events which led up to the so-called Scottsboro and other cases cited by the defendant, the Supreme Court of North Carolina held, in the year 1902, that the exclusion of persons of the Negro race, where they were excluded solely because of their race or color, is a violation of the Constitution of the United States.

STATE v. PEOPLES, 131 N.C. 784, 42 S.E. 814

STATE v. DANIELS, 134 N.C. 641, 46 S.E. 743

The question raised goes to the administration of the jury system rather than the statutes upon which the administration is based. Chapter 9 of the General Statutes of North Carolina regulating the methods for the selection of both grand jurors and petit jurors, and their qualifications for jury service, has been held constitutional and not discriminatory by our State Supreme Court and has been before the Supreme Court of the United States and this Court has not said that the statutes themselves are discriminatory or unconstitutional.

STATE v. WALLS, 211 N.C. 487, 191 S.E. 232

(Certiorari denied)

WALLS v. NORTH CAROLINA, 302 U.S. 635, 82 L. ed. 494)

BRUNSON v. NORTH CAROLINA, 332 U.S. 851, 92 L.ed. 1132

Petitioner in the Federal District Court made much of the contention that G.S. 9-1 imposed a mandatory duty on the jury commission of the several counties of North Carolina to do more than refer to the tax returns of the several counties in making up jury lists from which grand and petit juries were to be drawn (F.Tr. 12, 16, 20). This precise question has been decided by the Supreme Court of

North Carolina in *STATE v. BROWN*, 233 N.C. 202, 63 S.E. (2d) 99.

Chief Justice Stacy, in writing the opinion of the Court in *STATE v. BROWN*, *supra*, met this contention squarely and answered it as follows:

"Whatever may be the holding in other jurisdictions, it is thoroughly settled by our decisions that the provisions of the statute now in focus are directory, and not mandatory, in the absence of proof of bad faith or corruption on the part of the officers charged with the duty of selecting the jury list. *S. v. Mallard*, 184 N.C. 667, 114 S.E. 17 and cases there cited. Not only has no bad faith or corruption been shown on the part of the officers here, but none has so much as been suggested. *S. v. Smarr*, 121 N.C. 669, 28 S.E. 549. Hence, the motions to quash and in arrest were properly overruled."

It is when a Negro defendant is deprived, by design of the chance of having Negroes on the jury that the Fourteenth Amendment to the United States Constitution may be invoked for his protection.

*STRAUDER v. WEST VIRGINIA*, 100 U.S. 303, 25 L.ed. 664

*NORRIS v. ALABAMA*, 294 U.S. 587, 79 L.ed. 1074

*HOLLINS v. OKLAHOMA*, 295 U.S. 394, 79 L.ed. 1500

*HALE v. KENTUCKY*, 303 U.S. 613, 82 L.ed. 1052

*PIERRE v. LOUISIANA*, 306 U.S. 354, 83 L.ed. 757

*SMITH v. TEXAS*, 311 U.S. 128, 85 L.ed. 84

In *AKINS v. TEXAS*, 325 U.S. 398, 89 L.ed. 1692, the Court uses the words "purposeful discrimination." In *NORRIS v. ALABAMA*, *supra*, the Court uses the words "long-continued, unvarying, and wholesale exclusion of Negroes from jury service."

It is very generally held that the burden of proof is on the defendant to show an alleged discrimination in the selection of a grand or petit jury.

*AKINS v. TEXAS*, 325 U.S. 398, 89 L.ed. 1692

*MURRAY v. LOUISIANA*, 163 U.S. 101, 41 L.ed. 87

There is a presumption that officers in charge of the selection and summoning of a jury or jury panel will be presumed to have performed their duty fairly and justly without discrimination against any race or class. In other words, discrimination in the selection of a jury will not be presumed.

TARRANCE v. FLORIDA, 188 U.S. 519, 47 L.ed. 572, 116 So. 470 (Fla.). (Certiorari denied in 278 U.S. 599, 73 L.ed. 525)

Fairness in selection has never been held to require proportional representation of races upon a jury.

STATE v. KORITZ, 227 N.C. 553, 43 S.E. (2d) 77 (Certiorari denied 92 L.ed. 354)

AKINS v. TEXAS, 325 U.S. 398, 89 L.ed. 1692

VIRGINIA v. RIVES, 100 U.S. 313, 25 L.ed. 667

THOMAS v. TEXAS, 212 U.S. 278, 53 L.ed. 512

ZIMMERMAN v. STATE (Md.), 59 A (2d) 675 (Certiorari denied 93 L.ed. (Ad. Op. No. 7) 425)

A defendant has no constitutional right to be indicted or tried by any particular jury or by a jury composed in part of members of his race or class.

STATE v. PEOPLES, 131 N.C. 784, 42 S.E. 814

STATE v. SLOAN, 97 N.C. 499

STATE v. LOGAN, 341 Mo. 1164, 111 S.W. (2d) 1101

MARTIN v. TEXAS, 200 U.S. 316, 50 L.ed. 494

"It is unsafe we think, to attach too much significance to abstract mathematical ratios or to the so-called law of recurrences in determining whether there has been arbitrary discrimination in the selection of the juries."

SWAIN v. STATE, 215 Ind. 259, 18 N.E. (2d) 921, 926

The defendant challenged the array of petit jurors and moved the Court that the entire array of special veniremen be quashed and set aside and caused to be issued a subpoena duces tecum to the Chairman of the Vance County Board of Commissioners, the Clerk of said Board, the Clerk



of the Superior Court, the county tax collector and the sheriff, all of Vance County, requiring them to bring their several records pertaining to the listing, drawing and summoning of jurors in Vance County and the jury boxes and records pertaining thereto. (S.R. 13 and 14).

When said witnesses, records and jury boxes had been brought into the Court the defendant was given an opportunity to present evidence in support of his motion that the array of petit jurors and special veniremen summoned from Vance County be quashed and set aside.

F. H. ELINGTON, Chairman of the Board of Commissioners of Vance County, is quoted as having testified: "I have lived in Vance County since 1915, that is, about 34 years, and during that 34 years I have never known a Negro to be called for jury, grand or petit." (S.R. 16). This evidence is only negative in character but the witness testified affirmatively that he had served on the Board of Commissioners for Vance County for only 20 months "and during the time that I have held this position colored persons were drawn to serve on the jury in Vance County. I do not know who they were but there are a number of them". (S.R. 16). The witness testified further that there had been no purposeful discrimination between the races but that the Commissioners selected names for the jury from the tax books and from the tax lists who were "law abiding citizens, taxpayers and persons of good moral character, and I followed that proceeding in the selection of the names of the colored people." (S.R. 17). H. M. ROBINSON, Clerk of the Board of Commissioners of Vance County for some 19 years, was quoted as testifying: "as Clerk of the Board I am present when persons are drawn for jury duty in Vance County; I don't know when Negroes were drawn for jury duty in Vance County; I write down the names they read to me; I don't know whether any Negroes' names were drawn for jury duty during those 18 years." In addition thereto the witness testified: "I make the list and turn it over to the Chairman of the Board, and each Township has white and colored according to the race all in the same book. And I only prepare a list from the tax books." (S.R. 18). He further testified that he was present when the jury

list was revised and purged in July, 1949, and that "This list was made up from both colored and white citizens whose names appear upon the tax scrolls of Vance County who in the opinion of the Commissioners are men of good moral character, men and women of good moral character and qualified to serve as jurors, and who had paid their taxes." (S.R. 21). He further testified that in the purging and revision of the jury list that no systematic purpose or effort to exclude any member of the colored race was made; that "the jury box from which the special venire was drawn for this trial was composed of both white and colored jurors in fair proportion to the number among the races, and the people who were qualified from both races from a moral standing and character, and moral fitness to serve as jurors". (S.R. 21). The witness also testified that at the revision of the jury box on the first Monday in July "There weren't anything said by way of discrimination against placing the names of colored people in the jury box, and that there weren't anything placed on them in any way to indicate that the name on the scroll was Negro or white, the only thing there was just the Township number for each one, and that applied to whites as well as Negroes". (S.R. 22).

The evidence of the other witnesses was of similar import in that it was largely negative in character, the witnesses merely saying that they did not know of any Negroes who had served on the jury in Vance County but admitted that they know nothing about the composition of the jury list in the box as of July 1st, 1949. While some of the witnesses testified that they had lived in the County all of their lives and had never been called on to serve as jurors, the record is silent as to whether the witnesses were members of the Negro or white race. Most of the persons identified as being qualified to serve on the jury were doctors, dentists, undertakers, embalmers and others exempted under G.S. 9-19 from jury duty. Certain school teachers were pointed out as persons qualified to serve on juries who had not served but the record fails to show whether such persons resided in the county only during the school terms or were actually residents and taxpayers of the county.

The special venire summoned in this case was drawn from the list placed in the July 1st 1949 jury box, but it will be noted that the petitioner's evidence relates to alleged irregularities and discrimination existing prior to the making up of the 1949 list. To allow the petitioner to show, if he could, that irregularities appeared in the 1949 jury list, the Court ordered the box to be produced in Court and be opened by the Sheriff of the County in the presence of four County Commissioners, the Clerk of the Board of Commissioners and counsel for the petitioner. The petitioner, through his counsel, was permitted to make such examination of the scrolls therein contained as he desired. (S.R. 42).

A large number of scrolls were drawn from the box, including the names of both white and Negroes, and others unidentified as to race. Before or after the names on many of the scrolls appeared a dot which the petitioner contends was placed on the scrolls prior to the time they were put in the jury box for the purpose of identifying them as to race, but the record is silent as to who placed the dots on the scrolls or their purpose. The petitioner's witnesses identified many of the scrolls but were unable to distinguish between members of the white and colored races by such dots. (App. to Brief, pp. 51-53, C.C.A. 4, No. 6331.)

Only a part of the scrolls were drawn from the box but 104 of these were Negroes. (S.R. 54).

*It is not sufficient for the petitioner merely to show irregularities in the composition of jury boxes prior to July 1st, 1949, but he must show affirmatively that purposeful discrimination was employed or other irregularities existed in the list constituting the 1949 box from which the special venire was drawn. This he has failed to do. Of the special venire of 100 scrolls drawn from the Vance County 1949 box in the presence of the petitioner and at least one of his attorneys, sixty-three including four Negroes, appeared in the trial Court at the appointed time. The record is silent as to why none of these Negroes sat as members of the trial jury, (S.R. 59) though there is an intimation that one was examined on the voir dire.*

This Court in *CASELL v. TEXAS*, 339 U.S. 282, 94

L.ed. 563 (Adv. Sh. 13), quoting from *HILL v. TEXAS*, 316 U.S. 400, 404, 62 S.Ct. 1159, 1161, 86 L.ed. 1159, said:

"The existence of the kind of discrimination described in the Hill case does not depend upon systematic exclusion continuing over a long period and practiced by a succession of jury commissioners. SINCE THE ISSUE MUST BE WHETHER THERE HAS BEEN DISCRIMINATION IN THE SELECTION OF THE JURY THAT HAS INDICTED PETITIONER, it is enough to have direct evidence based on the statements of the jury commissioners in the very case. Discrimination may be proved in other ways than by evidence of long continued unexplained absence of Negroes from many panels. The statements of the jury commissioners that they chose only whom they knew, and that they know no eligible Negroes in an area where Negroes made up so large a proportion of the population, prove the intentional exclusion that is discrimination in violation of petitioner's constitutional rights." (Emphasis added).

*PATTON v. MISSISSIPPI*, 322 U.S. 463, 92 L.ed. 76

The respondent's evidence shows affirmatively that eligible persons of the Negro race were not intentionally, purposefully and systematically excluded from petit juries in Vance County, and in particular the special venire drawn from the 1949 Jury box. (App. to Brief pp. 53-59, C.C.A. 4, No. 6331.)

The petitioner on page 20 and 22 of his brief insists that dots or periods appeared before the names on scrolls representing members of the Negro race for the purpose of identification. This statement is wholly unsupported by any evidence. On the contrary the evidence affirmatively shows that the dots appearing were not used for the purpose of identification and the witnesses were unable to identify the names on such scrolls as either whites or Negroes.

*STATE v. WALLS*, 211 N. C. 487, 191 S.E. 232

*WALLS v. NORTH CAROLINA*, 302 U.S. 635, 82 L. ed. 494

Under the North Carolina practice the trial Court is required at the close of the *voir dire* to make appropriate



findings of fact. In the instant case the Court made such findings of fact based on the evidence and denied the petitioner's motion to quash the entire array of the petit jury and special veniremen summoned from Vance County (S.R. 57 through 63) (App. to Brief, pp. 41-45, C.C.A. 4, No. 6331.)

While it is recognized by the State that on a question of this kind this Court will examine the facts and evidence to see if fundamental constitutional rights have been denied, *STATE v. SPELLER*, 229 N.S. 67, nevertheless, in State and Federal courts great weight is accorded to the findings of the presiding judges who make the initial decisions and have a better opportunity to investigate the facts.

*THOMAS v. TEXAS*, 212 U.S. 278, 53 L.ed. 512

*AKINS v. TEXAS*, 325 U.S. 398, 89 L.ed. 1692

In *THOMAS v. TEXAS*, *supra*, this Court said:

"As before remarked, whether such discrimination was practiced in this case was a question of fact, and the determination of that question adversely to plaintiff in error by the trial court and by the court of criminal appeals was decisive, so far as this court is concerned, unless it could be held that these decisions constitute such causes as amounted to an infraction of the Federal Constitution, which cannot be presumed, and which there is no reason to hold on the record before us. On the contrary, the careful opinion of the court of criminal appeals, setting forth the evidence, justifies the conclusion of that court that the Negro race was not intentionally or otherwise discriminated against in the selection of the grand and petit jurors. Indeed, there was a Negro juror on the grand jury which indicted plaintiff in error, and there were Negroes on the venire from which the jury which tried the case was drawn, although it happened that none of them were drawn out of the jury box."

In *AKINS v. TEXAS*, *supra*, the Court said:

"As will presently appear, the transcript of the evidence presents certain inconsistencies and conflicts of testimony in regard to limiting the number of Negroes on the grand jury. Therefore, the trier of fact who

heard the witnesses in full and observed their demeanor on the stand has a better opportunity than a reviewing court to reach a correct conclusion as to the existence of that type of discrimination. While our duty, in reviewing a conviction upon a complaint that the procedure through which it was obtained violates due process and equal protection under the Fourteenth Amendment, calls for our examination of evidence to determine for ourselves whether a Federal constitutional right has been denied, expressly or in substance and effect, *NORRIS v. ALABAMA*, 294 U.S. 587, 589, 590, 70 L.ed. 1074, 1076, 1077, 55 S.Ct. 579; *SMITH v. TEXAS*, 311 U.S. 123, 130, 85 L.ed. 84, 86, 61 S.Ct. 164, we accord in that examination great respect to the conclusion of the state judiciary. *PIERRE v. LOUISIANA*, 306 U.S. 354, 358, 83 L.ed. 757, 760, 59 S.Ct. 536. That respect leads us to accept the conclusion of the trier on disputed issues 'unless it is so lacking in support in the evidence that to give it effect would work that fundamental unfairness which is at war with due process'."

We say that at the hearing before the Federal Court nothing new to strengthen petitioner's contention was brought out, but on the contrary the evidence tended to show that petitioner had been afforded every right guaranteed to him by the Federal Constitution. The evidence showed that petitioner had been indicted by a Grand Jury of which two of the members thereof were members of the Negro race. (App. to Brief, p. 39, C.C.A. 4, No. 6331.) It also established the fact that the jury box of Vance County from which was drawn the special venire for Bertie County and from which the petit jury which tried petitioner was selected; was duly purged according to the laws and statutes of North Carolina and that names of members of both races were placed therein without regard to whether they were members of the white or Negro race. (F.Tr. 14, 16, 34, 38). That at this hearing it was established that 145 names of Negroes were in both sections of the Jury Box, *ie*, Box 1 and 2. (F.Tr. 92). That of the 100 jurors constituting the special venire for Bertie County, 7 were members of the Negro race; (F.Tr. 23) (App. to Brief, p. 33, C.C.A. 4, No. 6331); that 4 of the 7 Negroes so selected reported to Bertie County (App. to Brief, p. 33, C.C.A. 4, No. 6331); that the 3

who did not report were dead. (App. to Brief, p. 33, C.C.A. 4, No. 6331). That of the 41 Negroes whose names were contained in Box 2, the evidence shows that the Sheriff of Vance County and his deputies summoned all those drawn for jury duty without regard to race (App. to Brief, p. 34, C.C.A. 4, No. 6331, F.Tr. 83, 93, 94). That these records show that four Negroes served as members of the Grand Jury from the time the Box was made up until January 1951. (App. to Brief, p. 34, 35, C.C.A. 4, No. 6331, F.Tr. 82, 95). That the remaining Negroes, except 7 who were not to be found within the county by the Sheriff and four others, one of whom was a fugitive from justice, served as members of jury panels at all but several terms of the Superior Court of Vance County. (App. to Brief, p. 34-35, C.C.A. 4, No. 6331). That an average of three or four Negroes has served on the jury panel of Vance County during each term of Superior Court, subsequent to the purging of the jury box in July, 1949. (App. to Brief, p. 34-35, C.C.A. 4, No. 6331, F.Tr. 82-88, 95).

## CONCLUSION

We do not think there has been shown in this case any gross violation of constitutional right of such a nature as would authorize a Federal Court to disturb the trial in the State Court by a *habeas corpus* proceeding. In the case of *SANDERLIN v. SMYTH*, 4 Cir., 138 Fed. (2d) 729, Judge Parker, speaking for the Court, said:

"The writ of *habeas corpus* may be issued by a federal court or judge in cases where petitioner is imprisoned under the Judgment of a State Court only if it is made to appear, (1) *that there has been such gross violation of constitutional right as to deny the substance of a fair trial, and the prisoner has not been able to raise the question on the trial because of ignorance, duress or other reason for which he should not be held responsible*, (2) that he has exhausted his remedies under state law, and (3) that no adequate remedy is available to him under state law, either because state procedure does not provide adequate corrective process or because there are exceptional circumstances, such as local prejudice or an inflamed condition of the public

mind, which render it impossible or unlikely for him to obtain adequate protection of his right in the courts of the state, i.e. he is entitled to the writ in the federal courts 'only when the state courts will not, or cannot, do justice'. United States ex rel. Lesser v. Hunt, 2 Cir., 117 F. 2d 30, 31; Moore v. Dempsey, *supra*." (Emphasis supplied).

The result of the whole matter as to the position of the Federal Courts on habeas corpus is well stated in the case of U. S. ex rel. FEELEY v. RAGEN, 7 Cir., 166 Fed. (2d) 976, where the Court said:

"We should not lose sight of the fact that the Federal courts are being used to invade the sovereign jurisdiction of the States, presumed to be competent to handle their own police affairs, as the Constitution recognized when the police power was left with the States. *We are not super-legislatures or glorified parole boards.* We as courts look only to the violation of Federal Constitutional rights. When we condemn a State's exercise of its jurisdiction and hold that the exercise of its powers is not in accordance with due process, we are in effect trying the States. It is State action that is on trial, and a decent regard for the coordinate powers of the two governments requires that we give due process to the State. That is the reason that in habeas corpus cases the relator must first show that he has exhausted his State remedies to open the way for the Federal courts to try the State's exercise of its sovereign power. For after all, the State represent the people more intimately than the Federal Government.

"To redress an alleged imbalance between the State's exercise of its power and the rights of the individual, the Federal courts exercise a delicate function, the importance of which points up our duty to consider that imbalance in the light of the rights of organized society through the State Government, representing all the people, as against the relator-defendant. There is no room here for crusaders or the fulfillment of missions. We are to hold the balance true. Frank v. Mangum, 237 U. S. 309, 329, 35 S. Ct. 582, 59 L. Ed. 969; Urquhart, Sheriff v. Brown, 205, U.S. 179, 183, 27 S. Ct. 459, 51 L. Ed. 760; Baker v. Grice, 169 U.S. 284, 290, 291, 18 S. Ct. 323, 42 L. Ed. 748." (Emphasis supplied).

The petitioner was tried in a court of general jurisdiction



in Bertie County, North Carolina, and he raised the constitutional issue which he is now asking this Court to retry. This issue was decided on its merits adversely to petitioner in the State Courts, and being dissatisfied with these decisions, the petitioner is simply asking the Federal Court to use the writ of *habeas corpus* as a substitute for an appeal and thereby retry the issue again. In other words, the Federal Court, according to petitioner's concepts, would be a super court of appeals. We think that we have clearly shown that this is not the proper use of *habeas corpus*. The petitioner had the precise question before this court reviewed by the Supreme Court of North Carolina. The petitioner availed himself fully thereof, and, as we see it, he can not complain and assert that he is entitled to retry the case in the Federal Court, especially since the Supreme Court of the United States, having before it a record of all the proceedings and knowing the seriousness of the situation, saw fit to deny petitioner's application for a writ of *certiorari*. The conclusion of *STONEBREAKER v. SMYTH* supra, relied on by the Court below, is inescapable; certainly relief would have been afforded petitioner at some point had there been merit in his contention.

Respectfully submitted,

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## APPENDIX

## Chapter 7, General Statutes of North Carolina:

§ 7-63. *Original jurisdiction.*—The superior court has original jurisdiction of all civil actions whereof exclusive original jurisdiction is not given to some other court; and of all criminal actions in which the punishment may exceed a fine of fifty dollars, or imprisonment for thirty days, and of all such affrays as shall be committed within one mile of the place where, and during the time, such court is being held; and of all offenses whereof exclusive original jurisdiction is given to justices of the peace, if some justice of the peace shall not within twelve months after the commission of the offense proceed to take official cognizance thereof.

## Chapter 14, General Statutes of North Carolina:

§ 14-21. *Punishment for rape.*—Every person who is convicted of ravishing and carnally knowing any female of the age of twelve years or more by force and against her will, or who is convicted of unlawfully and carnally knowing and abusing any female child under the age of twelve years, shall suffer death: Provided, if the jury shall so recommend at the time of rendering its verdict in open court, the punishment shall be imprisonment for life in the state's prison, and the court shall so instruct the jury.

## Chapter 9, General Statutes of North Carolina:

§ 9-1. *Jury list from taxpayers of good character.*—The board of county commissioners for the several counties at their regular meetings on the first Monday in June in the year 1947, or the jury commissions or such other legally constituted body as may in the respective counties be charged by law with the duty of drawing names of persons for jury service, at the times of their regular meetings, and every two years thereafter, shall cause their clerks to lay before them the tax returns for the preceding year for their county, and a list of names of persons who do not appear upon the tax lists, who are residents of the county and over

twenty-one years of age, from which lists the board of county commissioners or such jury commissions shall select the names of such persons who reside in the county who are of good moral character and have sufficient intelligence to serve as members of grand and petit juries. A list of the names thus selected by the board of county commissioners or such jury commissions shall be made out by the clerk of the board of county commissioners or such jury commissions and shall constitute the jury list of the county and shall be preserved as such.

The clerk of the board of county commissioners or such jury commissions, in making out the list of names to be laid before the board of county commissioners or such jury commissions, may secure said lists from such sources of information as deemed reliable which will provide the names of persons of the county above twenty-one years of age residing within the county qualified for jury duty. There shall be excluded from said lists all those persons who have been convicted of any crime involving moral turpitude or who have been adjudged to be non compos mentis.

*§ 9-2. Names on list put in box.*—The commissioners at their regular meeting on the first Monday in July in the year nineteen hundred and five, and every two years thereafter, shall cause the names on their jury list to be copied on small scrolls of paper of equal size and put into a box procured for that purpose, which must have two divisions marked No. 1 and No. 2; respectively, and two locks, the key of one to be kept by the sheriff of the county, the other by the chairman of the board of commissioners, and the box by the clerk of the board.

*§ 9-3. Manner of drawing panel for term from box.*—At least twenty days before each regular or special term of the superior court, the board of commissioners of the county shall cause to be drawn from the jury box out of the partition marked No. 1, by a child not more than ten years of age, thirty-six scrolls except when the term of court is for the trials of civil cases exclusively, when they

need not draw more than twenty-four scrolls. The persons whose names are inscribed on said scrolls shall serve as jurors at the term of the superior court to be held for the county ensuing such drawing, and for which they are drawn. The scrolls so drawn to make the jury shall be put into the partition marked No. 2. The said commissioners shall at the same time and in the same manner draw the names of eighteen persons who shall be summoned to appear and serve during the second week, and a like number for each succeeding week of the term of said court, unless the judge thereof shall sooner discharge all jurors from further service. The said commissioners may, at the same time and in the same manner, draw the names of eighteen other persons, who shall serve as petit jurors for the week for which they are drawn and summoned. The trial jury which has served during each week shall be discharged by the judge at the close of said week, unless the said jury shall be then actually engaged in the trial of a case, and then they shall not be discharged until the trial is determined.

§ 9-6. *Jurors having suits pending.*—If any of the jurors drawn have a suit pending and at issue in the superior court, the scrolls with their names must be returned into partition No. 1 of the jury box.

§ 9-7. *Disqualified persons drawn.*—If any of the persons drawn to serve as jurors are dead, removed out of the county, or otherwise disqualified to serve as jurors, the scrolls with the names of such persons must be destroyed, and in such cases other persons shall be drawn in their stead.

§ 9-8. *How drawing to continue.*—The drawing out of partition marked No. 1 and putting the scrolls drawn into partition No. 2 shall continue until all the scrolls in partition No. 1 are drawn out, when all the scrolls shall be returned into partition No. 1 and drawn out and drawn out again as herein directed.

§ 9-19. *Exemptions from jury duty.*—All practicing physicians, licensed druggists, telegraph operators who are



in the regular employ of any telegraph company or railroad company, train dispatchers who have the actual handling of either freight or passenger trains, regularly licensed pilots, regular ministers of the gospel, officers or employees of a state hospital for the insane, active members of a fire company, funeral directors and embalmers, printers and linotype operators, all millers of grist mills, all United States railway postal clerks and rural free delivery mail carriers, locomotive engineers, brakemen and railroad conductors in active service, radio broadcast technicians, announcers, and optometrists, registered or practical nurses in active practice and practicing attorneys at law, and all members of the national guard. North Carolina state guard and members of the civil air patrol, naval militia, officers reserve corps, enlisted reserve corps, and the naval reserves, who comply with and perform all duties required of them as members of the national guard, naval militia, officers reserve corps, enlisted reserve corps, and the naval reserves, shall be exempt from service as jurors.

• § 9-24. *How grand jury drawn.*—The judges of the superior court, at the terms of their courts, except those terms which are for the trial of civil cases exclusively, and special terms for which no grand jury has been ordered, shall direct the names of all persons returned as jurors to be written on scrolls of paper and put into a box or hat and drawn out by a child under ten years of age; whereof the first eighteen drawn shall be a grand jury for the court; and the residue shall serve as petit jurors for the court.

§ 9-29. *Special venire to sheriff in capital cases.*—When a judge of the superior court deems it necessary to a fair and impartial trial of any person charged with a capital offense, he may issue to the sheriff of the county in which the trial may be a special writ of venire facias, commanding him to summon such number of persons qualified to act as jurors in said county as the judge may deem sufficient (such number being designated in the writ), to appear on some specified day of the term as jurors of said

court; and the sheriff shall forthwith execute the writ and return it to the clerk of the court on the day when it is returnable, with the names of the jurors summoned.

§ 9-30. *Drawn from jury box in court by judge's order.*

—When a judge deems a special venire necessary, he may, at his discretion, issue an order to the clerk of the board of commissioners for the county, commanding him to bring into open court forthwith the jury boxes of the county, and he shall cause the number of scrolls as designated by him to be drawn from box number one by a child under ten years of age. The names so drawn shall constitute the special venire, and the clerk of the superior court shall insert their names in the writ of venire, and deliver the same to the sheriff of the county, and the persons named in the writ and no others shall be summoned by the sheriff. If the special venire is exhausted before the jury is chosen, the judge shall order another special venire until the jury has been chosen. The scrolls containing the names of the persons drawn as jurors from box number one shall, after the jury is chosen, be placed in box number two, and if box number one is exhausted before the jury is chosen, the drawing shall be completed from box number two after the same has been well shaken.

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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1952

No. 22

RALEIGH SPELLER.

*Petitioner,*

vs.

ROBERT A. ALLEN, WARDEN OF THE CENTRAL  
PRISON OF NORTH CAROLINA.*Respondent*ON WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE  
FOURTH CIRCUITBRIEF OF RESPONDENT, ROBERT A. ALLEN,  
WARDEN OF THE CENTRAL PRISON OF  
NORTH CAROLINAHARRY McMULLAN,  
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CommissionE. O. BROGDEN, JR.  
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& Public Works CommissionAttorneys for Robert A. Allen,  
Warden of Central Prison of North  
Carolina, Respondent.

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IN THE  
SUPREME COURT OF THE UNITED STATES

---

October Term, 1951

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No. 643

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RALEIGH SPELLER,

*Petitioner,*

vs.

ROBERT A. ALLEN, WARDEN OF THE CENTRAL  
PRISON OF NORTH CAROLINA,

*Respondent*

---

ON WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE  
FOURTH CIRCUIT

---

BRIEF OF RESPONDENT, ROBERT A. ALLEN,  
WARDEN OF THE CENTRAL PRISON OF  
NORTH CAROLINA

---

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 192 Fed. (2d) 763. The opinion of the District Judge is reported at 99 Fed. Supp. 92, sub nom. SPELLER v. CRAWFORD (R. ).

Opinions of the Supreme Court of North Carolina that deal with this case are reported as follows:



STATE v. SPELLER, 229 N. C. 67, 47 S. E. (2d), 537  
(New Trial)

STATE v. SPELLER, 230 N. C. 345, 53 S. E. (2d), 294,  
(New Trial)

STATE v. SPELLER, 231 N. C. 549, 57 S. E. (2d), 759  
(Affirmed)

On October 9, 1950, this Court denied Petitioner's application for a Writ of Certiorari and this denial is reported as SPELLER v. NORTH CAROLINA, 340 U. S. 835, 71 S. Ct. 18, 95 L. Ed. 613.

### THE QUESTIONS PRESENTED

1. Where Petitioner (a Negro) in a State criminal trial raises constitutional issues as to the organization of the petit jury because of alleged racial discrimination, and these issues are determined adversely to Petitioner, can a judgment of conviction in the State court be challenged collaterally upon the same issues and grounds by Federal Habeas Corpus proceeding.

2. If Federal Habeas Corpus can be used to collaterally challenge a judgment of conviction in a State criminal trial, has Petitioner established unconstitutional discrimination in the selection of the petit jury.

3. Whether or not Petitioner is seeking, in this case, to use a Federal Habeas Corpus proceeding to retry the identical facts which were before the State trial court, the highest appellate court of the State, and this court upon a prior Petition for Writ of Certiorari.

# STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States

## AMENDMENT XIV

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the **privileges or immunities** of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

## THE JUDICIAL CODE, 28 U. S. C.

"§ 2241. *Power to grant writ*

"(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

\* \* \* \* \*

"(c) The writ of habeas corpus shall not extend to a prisoner unless—

\* \* \* \* \*

"(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or"

"§ 2254. *State custody; remedies in State courts*

"An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective

process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented. \* \* \*"

#### Statutes of North Carolina

The statutes of North Carolina which respondent considers to be applicable and involved in this case appear in the appendix to this brief (see p. )

#### STATEMENT AND HISTORY OF THE CASE

The petitioner, a Negro, was thrice tried, convicted and sentenced to death in the Superior Court of Bertie County, North Carolina, for the crime of rape of Mrs. Aubrey Davis, a white woman of about 50 years of age, and subsequently appealed from each of said convictions to the Supreme Court of North Carolina, which appeals are reported as *STATE v. SPELLER*, 229 N. C. 67, 47 S. E. (2d), 537; *STATE v. SPELLER*, 230 N. C. 345, 53 S. E. (2d), 294; and *STATE v. SPELLER*, 231 N. C. 549, 57 S. E. (2d), 759. On the first appeal, the indictment found at the August, 1947, Term of Bertie County Superior Court and the subsequent trial and conviction at the November Term, 1947, of said Court were set aside and petitioner granted a new trial because of jury defect. On the second appeal, the trial and conviction at the November Term, 1948, of said Court, on a bill of indictment returned at the August Term, 1948, by a Grand Jury consisting of members of both the white and Negro races, was set aside and a new trial granted for failure to allow the petitioner sufficient time or opportunity to present his challenge to the array. The validity of the second bill of indictment is not challenged. On the third appeal, the petitioner's conviction at the August Term, 1949, of said Court was affirmed by the North Carolina Supreme Court.

Petitioner then attempted to have his case reviewed by petition for certiorari filed in the Supreme Court of the United States. This application was dismissed, *SPELLER v. NORTH CAROLINA*, 340 U. S. 835, 71 S. Ct. 18, 95 L. Ed. 613. This denial was without any dissent.

Petitioner then filed a petition for a writ of habeas corpus in the District Court of the United States for the Eastern District of North Carolina. The writ was granted. After hearing evidence on the question presented and deciding that petitioner's position was without merit, the writ of habeas corpus theretofore issued was vacated and the petition dismissed on the grounds: (1) that upon the procedural history of the case the petitioner was not entitled to the writ and (2) even if petitioner was entitled to raise the same question passed on in the State courts, he had failed to substantiate the charge that he did not have a trial according to due process. The opinion of the District Judge is reported as *SPELLER v. CRAWFORD*, 99 F. Supp. 92. From this decision petitioner appealed to the United States Court of Appeals for the Fourth Circuit, which Court, in a *per curiam* opinion, *SPELLER v. ALLEN*, C.C.A. 4, 6331, decided November 5, 1951, 192 Fed. (2d) 477, affirmed the action of the District Court. Upon application of petitioner, this Court granted certiorari.

## FACTS

In attempting to state respondent's version of the facts, we will refer to the Federal Transcript of Evidence as "F.Tr.", and to the record on appeal to the Supreme Court of North Carolina from the Bertie County Superior Court as "S.R.". Where possible, references will be made to the printed record in this Court.

The petitioner was indicted for the capital crime of rape under section 14-21 of the General Statutes of North Carolina, which reads as follows:

*"Punishment for rape.*—Every person who is convicted of ravishing and carnally knowing any female of the age



of twelve years or more by force and against her will, or who is convicted of unlawfully and carnally knowing and abusing any female child under the age of twelve years, shall suffer death: Provided, if the jury shall so recommend at the time of rendering its verdict in open court, the punishment shall be imprisonment for life in the state's prison, and the court shall so instruct the jury."

When this case was called for trial at the August Term, 1949, of the Bertie County Superior Court, the trial Judge, in compliance with the defendant's motion, ordered "that a special venire from Vance County (Vance County being in the same judicial district as Bertie County) be summoned, by the Sheriff of Vance County, to attend at the courthouse at Windsor, N. C., at 10:30 A. M., on the 31st day of August, 1949, to serve as jurors in said action" and ordered "the Clerk of the Board of County Commissioners of Vance County to cause one hundred scrolls to be drawn from Box No. 1 by a child under ten years of age and the names so drawn shall constitute the special venire, and the Clerk of the Superior Court of Vance County shall insert their names in a writ of venire and deliver the same to the sheriff of Vance County, and the persons named in the writ, and no others, shall be summoned by the sheriff of Vance County to be and appear at the courthouse in Windsor in Bertie County at 10:30 A. M., on the 31st day of August, 1949." "That the said venire shall be drawn as aforesaid in the presence of the defendant, Raleigh Speller, and at least one of his attorneys, and the solicitor of this judicial district at 4:30 P. M., on the 29th day of August, 1949". (S. R. 4-5, 10-12).

Pursuant to the mandate of Section 9-1 of the General Statutes of North Carolina, the Board of County Commissioners for Vance County, at its July, 1949, meeting purged the jury boxes of said county by taking out and destroying all of the scrolls in said boxes, and by making up a new jury list and placing in jury box No. 1 the names of persons who were residents and taxpayers of said county, who

had paid their taxes for the preceding year, and who were persons of good moral character and qualified to serve as jurors, all free of any racial discrimination. (S. R. 32-33).

The record reveals that the special venire in this case was the first list of jurors drawn from the jury box after it was purged in July, 1949: (S. R. 23).

No challenge was made to the Grand Jury that found the bill of indictment nor was motion made to quash the indictment. After having been arraigned and having entered a plea of not guilty, petitioner, for the first time, challenged the entire array of Petit Jurors and special veniremen summoned from Vance County. This challenge was based on the grounds that the officers, whose duty it was to prepare the jury lists and draw the panels to be summoned by the sheriff, purposedly and systematically discriminated against members of the Negro race, of which the petitioner is one, by excluding Negroes from jury lists and panels solely and wholly because of their race and/or color, thereby violating the petitioner's right to a fair and impartial trial by his peers as guaranteed under the Constitution and Laws of the State of North Carolina and the Fourteenth Amendment to the Constitution of the United States. (S. R. 12 and 13).

Upon the petitioner's challenging the array of petit jurors and moving the Court that the entire array of special veniremen be quashed and set aside, the trial Court caused to be issued a subpoena *duces tecum* to the Chairman of the Vance County Board of Commissioners, the Clerk of said Board, the Clerk of Superior Court, the County Tax Collector and the Sheriff, all of Vance County, requiring them to bring in Court their several records pertaining to the listing, drawing and summoning of jurors in Vance County and the jury boxes and records pertaining thereto. (S. R. 14, 15 and 60).

When said witnesses, records, and jury boxes had been brought into the Court, the defendant was given an opportunity to present evidence in support of his motion that the

array of petit jurors and special veniremen summoned from Vance County be quashed and set aside. The petitioner presented several witnesses who testified as to the manner and method of the drawing of the special venire. (S.R. 16-56).

After the hearing ~~voir dire~~ the Court made a full and complete findings of fact (S. R. 57-63) and overruled or dismissed the motion of challenge to the array of petit jurors and the cause was duly tried by a jury drawn from a panel containing members of the Negro race which returned a verdict of guilty of rape in the first degree without recommendation of mercy. Upon the conclusion of the hearing as to the alleged discrimination, counsel for both the defendant and the State announced that they did not care to offer further evidence. (S. R. 56). The Court inquired of counsel for the defendant and State if they cared to be heard on their motions and they responded that they did not care to be heard. (S. R. 56 and 57). Counsel for the defendant at no time thereafter renewed his request to be allowed to proceed to examine other scrolls nor did he tender other witnesses who would testify as to any irregularities concerning the scrolls in the box. (S. R. 62).

The evidence in this case is of such sordid, revolting and repulsive nature that it will not be set out in detail except to the extent necessary to enable the Court to obtain a true picture of the commission of the crime upon which the petitioner was convicted.

The defendant offered no evidence (S. R. 121) but the State's evidence discloses that Mrs. Aubrey Davis, a woman of 52 years of age, and her totally deaf husband resided alone on the Williamston highway No. 70, about one mile south of the town. On the night of Friday, July 18th, 1947, about 10:30, her husband was asleep and she had undressed but before going to bed went to her back door to fasten it. Upon finding that the lock was broken and the hook bent she went on the back porch to get a hammer to straighten it. As she turned to re-enter the hall door she was rushed

upon and dragged into the back yard by the petitioner. In his efforts to quieten her screams, he choked and savagely beat her about the face and body, and finally criminally assaulted her by having sexual intercourse with her forcibly and against her will and, upon consummation of the crime, left her in a critical condition. (S.R. 63, 64, 65, 66, 67 and 77).

Two buttons and some wearing apparel were found at the spot where the crime was committed. When the petitioner was found in a filling station some six hundred yards from the Davis home he was sitting in a chair with his head in his hands, his face scratched and bleeding, and wet with perspiration; his shirt was torn with two buttons missing and upon comparison the buttons found at the scene of the crime were shown to be identical with the remaining buttons on his shirt. (S. R. 92, 93, 94, 96 and 97). When the petitioner was questioned about his torn clothes and the scratches on his face, he replied: "If you are talking about the deaf man's wife, I am the man, but I did not mean to hurt her." (S. R. 95). Mrs. Davis identified the petitioner as her assailant. (S. R 66).

## ARGUMENT

### I.

THE MERE FACT THAT A STATE COURT DECIDES CONSTITUTIONAL QUESTIONS IN A CRIMINAL TRIAL DOES NOT WARRANT THE REVIEW OF SUCH DECISIONS IN A HABEAS CORPUS PROCEEDING IN THE FEDERAL COURTS.

Cases dealing with *habeas corpus* in Federal Courts to question State action show that the Federal Courts have imposed severe limitations upon the matters that will be reviewed in such a proceeding. One such limitation is that the mere existence of a constitutional question as to the correctness of a decision of a State Court is not enough to justify the use of the writ of *habeas corpus*. Petitioner, how-



ever, all through his brief seems to assume that because a constitutional issue or question was presented in the criminal trial in the State Court and was decided by that Court, he is automatically entitled to review of such question on *habeas corpus* in the Federal Court. We think this is an erroneous viewpoint and that the mere existence of a constitutional question, because of the correctness of a decision of a State Court, is not enough to justify the use of the *habeas corpus* proceeding. In the case of *EURY v. HUFF*, 4 Cir., 141 Fed. (2d) 554, 555, on this same question, Judge Parker, speaking for the Court said:

"In addition to this, the question was one that could have been raised only in the original cause and not collaterally by petition to be released on *habeas corpus*. *Riddle v. Dyche*, 262 U. S. 333, 43 S. Ct. 555, 67 L. Ed. 1009. A prisoner does not show right to release on *habeas corpus* merely by showing error on his trial, even though this involves a violation of constitutional right. To entitle him to release on *habeas corpus* there must have been such **'gross violation of constitutional right as to deny (to the prisoner) the substance of a fair trial'** and thus oust the court of jurisdiction to impose sentence.' *Sanderlin v. Smyth*, 4 Cir., 138 F. 2d 729, 731. In the case cited, we laid down with some care the rules applicable to the issuance of the writ of *habeas corpus* in the case of a prisoner held under the judgment of a state court. The same rules are applicable in the case of a prisoner held under the judgment of a federal court, except, of course, that the rules as to the exhaustion of state remedies do not apply."

In the case of *GLASGOW v. MOYER*, 225 U. S. 420, 56 L. ed. 1147, this Court discusses the function of the writ of *habeas corpus* when reviewing State action, and especially when the issues are constitutional, and the Court said:

"The principle is not the less applicable because the law which was the foundation of the indictment and trial is

asserted to be unconstitutional or uncertain in the description of the offense. Those questions, like others, the court is invested with jurisdiction to try if raised, and its decision can be reviewed, like its decisions upon other questions, by writ of error. *The principle of the cases is the simple one that if a court has jurisdiction of the case the writ of habeas corpus cannot be employed to re-try the issues, whether of law, constitutional or other, or of fact.* (Italics supplied).

In the case of GRAHAM v. SQUIER, 9 Cir., 132 Fed. (2d) 681, the petitioner contended that he was automatically entitled to a writ of *habeas corpus* if any of his constitutional rights had been denied, and for this authority, he cited the case of BOWEN v. JOHNSTON, 306 U. S. 19, 23, 24, 83 L. ed. 455. The petitioner further called attention to an excerpt in *Corpus Juris* which stated that if evidence was secured by a violation of the defendant's constitutional rights, this would be a ground for the issuance of the writ. In disposing of these contentions, the Court said:

"Petitioner relies upon the case of Johnson v. Zerbst, 304 U. S. 458, 465-467, 58 S. Ct. 1019, 82 L. Ed. 1461, and upon the case of Bowen v. Johnston, 306 U. S. 19, pages 23, 24, 59 S. Ct. 442, page 444, 83 L. Ed. 455, from which he quotes:

"The scope of review on habeas corpus is limited to the examination of the jurisdiction of the court whose judgment of conviction is challenged. (Cases cited.) But if it be found that the court had no jurisdiction to try the petitioner, *or that in its proceedings his constitutional rights have been denied*, the remedy of habeas corpus is available."

"In the above quotation the clause italicized is stressed by petitioner, and is particularly relied upon by him because, as hereinbefore stated, it is his contention that at the trial one of his constitutional rights—the guaranty against self-incrimination, as declared by the Fifth

Amendment—had been transgressed. Petitioner urges that this Bowen case 'holds that the writ is available when constitutional rights have been denied as well as when jurisdiction is lacking.'

"The language of the emphasized clause in the excerpt from the Bowen case, considered in and of itself and isolated from the text of which it is a part, might seem to indicate, as petitioner would have it, that whenever *any* constitutional right is infringed, in a criminal trial, the accused, if he be convicted, may thereafter nullify the judgment by bringing a habeas corpus proceeding. But taking that clause, as is obviously necessary in order to arrive at the true meaning, in conjunction with the statements of the Supreme Court contained in the very same paragraph, and which express the unvaried rule that a criminal action may be collaterally attacked on *jurisdictional* grounds alone, one sees immediately that the Supreme Court intended no more than that the writ of habeas corpus should issue only in those cases where the denial of the constitutional rights of the accused operated to prevent the trial court from acquiring jurisdiction over the person of the accused, or if jurisdiction did exist at the commencement of the trial, operated to destroy that jurisdiction at some stage during the progress thereof. That this interpretation of the Supreme Court's language is correct will appear from an examination of the sustaining authorities, which are cited in the case immediately following the clause under discussion.

"Petitioner calls to our attention the following statement, excerpted from 29 Corpus Juris at page 47:

" 'But a conviction upon evidence secured by violation of defendant's constitutional rights, may afford ground for the writ.'

"That statement is supported by the single case of *In re Horschler*, 116 Misc. 243, 190 N. Y. S. 355. There

the New York court held that when a defendant is convicted of illegally possessing liquor upon evidence secured through illegal search and seizure, he is entitled to a writ of habeas corpus. Most of the opinion in the case is devoted to ascertaining whether there had been an illegal search and seizure, and when the court arrived at the determination that such had been the case, it concluded summarily that the writ should issue, without an explanation as to the purposes and functions of a writ of habeas corpus. It may be that by constitutional provision or by statutory authorization the New York courts are empowered to grant the writ under circumstances such as those existing in the Horschler case; but the matter has been decided to the contrary so far as the federal courts are concerned."

## II.

**THE ISSUE AS TO WHETHER OR NOT PERSONS OF THE NEGRO RACE WERE UNCONSTITUTIONALLY EXCLUDED FROM THE PETIT JURY WAS PASSED UPON BY THE STATE TRIAL COURT ADVERSELY TO THE PETITIONER AND THIS ISSUE CANNOT NOW BE QUESTIONED OR RETRIED IN A HABEAS CORPUS PROCEEDING.**

There is no contention by petitioner that the Superior Court of Bertie County is not a Court of general jurisdiction (G. S. 7-63) or that the Court was without jurisdiction to try persons charged with rape as defined (G. S. 14-21) by the North Carolina statute. We, therefore, say that the Superior Court of Bertie County had jurisdiction, and had a right to decide every question occurring in the case, including the organization and qualification of the petit jury, whether the decision was correct or incorrect, and the proceedings in the Superior Court of Bertie County are not subject to collateral attack by the means of a writ of *habeas corpus* for the reason set forth in the petition, that is, a charge of unconstitutionality in the selection of the Petit Jury of said Court because of racial discrimination.



In the first section of this brief, we set out matters for which *habeas corpus* is not available as a method of review. We propose now to show that the authorities support the proposition that racial discrimination in the selection of jurors for a Petit Jury is considered to be an irregularity and not subject to attack upon a writ of *habeas corpus* in the Federal Court. Briefly, if the Superior Court of Bertie County originally had jurisdiction over the subject-matter and person of petitioner, it did not lose jurisdiction because of any irregularity in the selection of the Petit Jury. It is not contended that the bill of indictment was not found by eligible grand jurors as such, nor is it contended that the petitioner was convicted by a panel of petit jurors who were within themselves ineligible. Indeed, an inspection of the record will show that of the 100 jurors constituting the special venire from Vance County, 7 were members of the Negro race; that 4 of the 7 Negroes so selected reported to Bertie County (R. ; S. R. 59; App. to Brief, p. 33, C. C. A. 4, No. 6331), that the 3 who did not report were dead. (R. ; App. to Brief, p. 33, C. C. A. 4, No. 6331); that one of the Negroes was examined on his voir dire, but the jury as finally constituted was composed of members of the white race. There were two Negroes serving on the Grand Jury that found the bill of indictment against the petitioner in Bertie County (R. ; App. to Brief, p. 29-40, C. C. A. 4, No. 6331), and as previously stated the constitution of the Grand Jury is not here questioned.

The criminal procedure of North Carolina provides for an appeal to the Supreme Court of North Carolina as a matter of right in all criminal cases, and as we have heretofore pointed out, the Supreme Court of North Carolina does pass upon the question of the constitutionality of the constitution of juries, both Grand Juries and Petit Juries, (*STATE v. SPELLER*, *supra*). In other words, the question the petitioner sought to raise in his petition for *habeas corpus* was a matter that could be and was passed upon the merits by appeal to the Supreme Court of North Carolina. In support of our position that racial discrimination in the selection of Petit

Jury is an irregularity and does not cause the trial Court State to lose jurisdiction and is not subject to collateral attack on *habeas corpus*, we desire to cite and quote from the following authorities:

IN RE WOOD, 140 U. S. 278, 35 L. ed. 505

JUGIRO v. BRUSH, 140 U. S. 370, 35 L. ed. 511

ANDREWS v. SWARTZ, 156 U. S. 272, 39 L. ed. 505

KAIZO v. HENRY, 211 U. S. 146, 53 L. ed. 125

IN RE WILSON, 140 U. S. 575, 35 L. ed. 513

EX PARTE MURRAY, 66 Fed. Rep. 297

EX PARTE CAESAR, D. C., Texas, 27 Fed. Supp.

U. S. ex rel. JACKSON v. BRADY, D. C., Md., 47 Fed. Supp. 362

JOHNSON v. WILSON, D. C., Ala.; 45 Fed. Supp. 100 (Affirmed)

JOHNSON v. WILSON, 5 Cir., 131 Fed. (2d) 100

STATE ex rel. PASSER v. COUNTY BOARD, 191 Minn. 1, 240 N. W. 2d 916 (Minn.), Note p. 929

HALE v. CRAWFORD, 1 Cir., 65 Fed. (2d) 73

EURY v. HUFF, App. D. C., 146 Fed. (2d) 17

SCHOLZ v. SHAUGHNESSY, App. D. C., 180 F. 2d 450

U. S. ex rel. McCANN v. THOMPSON, 2 Cir., 144 F. 2d 604

In the case of IN RE WOOD, 140 U. S. 278, 35 L. ed. 505, the Court said:

"If the question of the exclusion of citizens of the same race from the lists of grand and petit jurors had been made during the trial in the Court of General Sessions, and erroneously decided against the appellant,

error in decision would not have made the judgment of conviction void, or his detention under it illegal: *Savin, Petitioner*, 131 U. S. 267, 279; *Stevens v. Fuller*, 136 U. S. 468, 478. Nor would that error, of itself, have authorized the Circuit Court of the United States, upon writ of habeas corpus, to review the decision or disturb the custody of the accused by the state authorities. The remedy, in such case, for the accused, was to sue out a writ of error from this court to the highest court of the State having cognizance of the matter, whose judgment, if adverse to him in respect to any right, privilege of immunity, specially claimed under the Constitution or laws of the United States, could have been reexamined, and reversed, affirmed or modified, by this court as the law required. Rev. Stat. § 709."

In the case of *JUGIRO v. BRUSH*, 140 U. S. 370, 35 L. ed. 511, the Court said:

"The statutes of New York regulating these matters do not, in any way, conflict with the provisions of the Federal Constitution; and if, as alleged, they were so administered by the state court, in appellant's case, as to discriminate against him because of his race, the remedy for the wrong done to him was not by a writ of habeas corpus from a court of the United States."

In the case of *IN RE WILSON*, 140 U. S. 575, 35 L. ed. 513, the Court said:

"The response thereto is, that no such act was passed; and that, even if it were, the defect in the number of grand jurors did not vitiate the entire proceedings; so that they could be challenged collaterally on *habeas corpus*, but it was only a matter of error, to be corrected by proceedings in error. It appears from the record that a challenge to the grand jury was made by the petitioner and overruled; but the ground here presented was not

In the case of *KAIZO v. HENRY*, 211 U. S. 146, 53 L. ed. 125, the Court said:

"These well-settled principles are decisive of the case before us. Disqualifications of grand jurors do not destroy the jurisdiction of the court in which an indictment is returned, if the court has jurisdiction of the cause and of the person, as the trial court had in this case. *Ex parte Harding*, 120 U. S. 782; *In re Wood*, 140 U. S. 278; *re Wilson*, 140 U. S. 575. See *Matter of Moran*, 140 U. S. 96, 104. The indictment, though voidable, if objection is seasonably taken, as it was in this case, is not void. *United States v. Gale*, 109 U. S. 65. The objection may be waived, if it is not made at all or delayed too long. This is but another form of saying that the indictment is a sufficient foundation for the jurisdiction of the court in which it is returned, if jurisdiction otherwise exists. That court has the authority to decide all questions concerning the constitution, organization and qualification of the grand jury, and if there are errors in dealing with these questions, like all other errors of law committed in the course of the proceedings, they can only be corrected by writ of error."

In the case of *ANDREWS v. SWARTZ*, 156 U. S. 39, 39 L. ed. 422, the Court said:

"The further contention of the accused is that he is restrained of his liberty in violation of the Constitution and laws of the United States, in that persons of his race were arbitrarily excluded, solely because of their race, from the panel of jurors summoned for the trial of the court at which he was tried, and because the state court denied him the right to establish that by competent proof.

"It is a sufficient answer to this contention that the state court had jurisdiction both of the offense charged and of the accused. By the laws of New Jersey the Court



Oyer and Terminer and general jail delivery has 'cognizance of all crimes and offences whatsoever which, by law, are or shall be of an indictable or presentable nature, and which have been or shall be committed within the county for which such court shall be held.' Rev. Stat. N. J. 272, § 36. If the state court, having entered upon the trial of the case, committed error in the conduct of the trial to the prejudice of the accused, his proper remedy was, after final judgment of conviction, to carry the case to the highest court of the State having jurisdiction to review that judgment, thence upon writ of error to this court, if the final judgment of such state court denied any right, privilege, or immunity specially claimed, and which was secured to him by the Constitution of the United States. *Even if it be assumed that the state court improperly denied to the accused, after he had been arraigned and pleaded not guilty, the right to show by proof that persons of his race were arbitrarily excluded by the sheriff from the panel of grand or petit jurors solely because of their race, it would not follow that the court lost jurisdiction of the case within the meaning of the well-established rule that a prisoner under conviction and sentence of another court will not be discharged on habeas corpus unless the court that passed the sentence was so far without jurisdiction that its proceedings must be regarded as void.* *Ex parte Siebold*, 100 U. S. 371, 375; *In re Wood*, 140 U. S. 278, 287; *In re Shibuya Jigiro*, 140 U. S. 291, 297; *Pepke v. Cronan*, 155 U. S. 100. *When a state court has entered upon the trial of a criminal case, under a statute not repugnant to the Constitution of the United States, and has jurisdiction of the offense and of the accused, no mere error in the conduct of the trial should be made the basis of jurisdiction in a court of the United States to review the proceedings upon writ of habeas corpus.*

"The application to the Circuit Court for a writ of *habeas corpus* was properly denied, and the judgment must be affirmed." (Italics supplied.)

### III.

#### UPON PETITION FOR WRIT OF HABEAS CORPUS, THE DECISION OF THE FEDERAL COURT IS DISCRETIONARY.

There is a long-established line of cases to the effect that where the Federal Court is reviewing by *habeas corpus* action of the State Courts, the Federal Court has a discretion in its decisions in such matters, and then when coupled with the other principle heretofore commented on that it is only in rare and exceptional cases that this discretion will be used in favor of interference in State action, we say that petitioner has failed to allege or show any circumstance which will warrant a writ of *habeas corpus* or his discharge. The matter is well expressed in the case of *LONG v. BENSON*, 6 Cir., 140 Fed. (2d) 195, 196, from which we quote as follows:

"In *United States ex rel. Kennedy v. Tyler*, 269 U. S. 13, 17, 46 S. Ct. 1, 3, 70 L. Ed. 138, it was said: 'The rule has been firmly established by repeated decisions of this court that the power conferred on a federal court to issue a writ of habeas corpus to inquire into the cause of the detention of any person asserting that he is being held in custody by the authority of a state court in violation of the Constitution, laws, or treaties of the United States, is not unqualified, but is to be exerted in the exercise of a sound discretion. The due and orderly administration of justice in a state court is not to be thus interfered with save in rare cases where exceptional circumstances of peculiar urgency are shown to exist.' *Ex parte Royall*, 117 U. S. 241, 250-253, 6 S. Ct. 734, 29 L. Ed. 868; *In re Wood*, 140 U. S. 278, 289, 11 S. Ct. 738, 35 L. Ed. 505; *In re Frederick*, 149 U. S. 70, 77, 78, 13 S. Ct. 793, 37 L. Ed. 653; (*People of State of New York v. Eno*, 155 U. S. 89, 98, 15 S. Ct. 30, 39 L. Ed. 80; *Whitten v. Tomlinson*, 160 U. S. 231, 240-242, 16 S. Ct. 297, 40 L. Ed. 406; *Baker v. Grice*, 169 U. S. 284, 290, 18 S. Ct. 323, 42 L. Ed. 748; *Tinsley v. Anderson*, 171 U. S. 101, 104, 105, 18 S. Ct. 805, 43 L. Ed. 91; *Davis v. Burke*, 179

U. S. 399, 401-403, 21 S. Ct. 210 45 L. Ed. 249; *Riggins v. United States*, 199 U. S. 547, 549, 26 S. Ct. 147, 50 L. Ed. 303; *Drury v. Lewis*, 200 U. S. 1, 6, 26 S. Ct. 229, 50 L. Ed. 343; *Glasgow v. Moyer*, 225 U. S. 420, 428, 32 S. Ct. 753, 56 L. Ed. 1147; *Johnson v. Hoy*, 227 U. S. 245, 247, 33 S. Ct. 240, 57 L. Ed. 497."

There are many other cases to this effect, and we have tried to collect the more important cases as follows:

ASHE v. VALOTTA, 270 U. S. 424, 70 L. Ed. 662  
IASIGI v. VAN DE CARR, 166 U. S. 391, 41 L. Ed. 1045  
EX PARTE ROYALL, 117 U. S. 241, 29 L. Ed. 868  
SWIHART v. JOHNSTON, 9 Cir., 150 Fed. (2d) 721  
JOHNSON v. WILSON, 5 Cir., 131 Fed. (2d) 1, 2  
EX PARTE MELENDY, 9 Cir., 98 Fed. (2d) 791  
URQUHART v. BROWN, 205 U. S. 179, 51 L. Ed. 760  
SANDER v. JOHNSTON, 9 Cir., 11 Fed. (2d) 509

In ASHE v. VALOTTA, *supra*, speaking of the Court's discretion this Court said:

"In so delicate a matter as interrupting the regular administration of the criminal laws of the state by this kind of attack, too much discretion cannot be used."

#### IV.

IN EXERCISING ITS DISCRETIONARY POWERS, RELATIVE TO GRANTING OR DENYING HABEAS CORPUS, THE FEDERAL COURT MAY CONSIDER THE ACTION OF THE STATE APPELLATE COURT AND THE DENIAL OF CERTIORARI BY THE SUPREME COURT OF THE UNITED STATES.

In view of the fact that the precise question sought to be raised by the petitioner before the Federal Court has been raised before the Supreme Court of North Carolina and has been decided adversely to him and in view of the denial of *certiorari* by the Supreme Court of the United States, we say



that petitioner's case "falls squarely within the rule that 'a federal district court will not usually reexamine on habeas corpus the questions thus adjudicated.'" **ADKINS v. SMYTH**, 4 Cir., 188 Fed. (2d) 452, and cases therein cited.

In the opinion below, as well as in **ADKINS v. SMYTH**, *supra*, the Fourth Circuit in citing from **STONEBREAKER v. SMYTH**, 4 Cir., 163 Fed. (2d) 498, quoted language appropriately pertinent as follows:

"We are confronted at the outset with the fact that the case presented by petitioner is precisely the same as that in which relief was denied by the Virginia courts and in which certiorari was denied by the Supreme Court of the United States. The rights of petitioners were fully presented in that case and the Virginia courts had full power to grant the relief asked, had they thought petitioner entitled to it. *The facts were fully before the Supreme Court of the United States on certiorari; and proper respect for that court compels the conclusion that if it had thought that the record showed a denial of petitioner's constitutional rights, certiorari would have been granted and petitioner would have been afforded relief. While action of the Virginia Courts and the denial of certiorari by the Supreme Court were not binding on the principle of res judicata, they were matters entitled to respectful consideration by the court below; and in the absence of some most unusual situation, they were sufficient reasons for that court to deny a further writ of habeas corpus.* It would be intolerable that a federal district court should release a prisoner on habeas corpus after the State Courts have refused him relief in precisely the same case on a similar writ and the United States Supreme Court has refused to review their action on certiorari. *This would be in effect to permit a federal district court to review the Supreme Court of the United States as well as the highest court of the state. The rule in such cases was stated*

in the case of *White v. Regan*, 324 U. S. 760, 764, 765, 65 S. Ct. 978, 981, 89 L. Ed. 1348, relied on by the court below as follows:

"If this court denies certiorari after a state court decision on the merits, or if it reviews the case on the merits, a Federal District Court will not usually reexamine on habeas corpus the questions thus adjudicated. *Ex Parte Hawk*, supra, 321 U. S. 118, 64 S. Ct. 448, 88 L. Ed. 572."

"The citation of *Ex Parte Hawk* shows that the court had in mind the use of the words 'will not usually re-examine' in the statement just quoted; for the court had pointed out in that case the sort of cases in which the district court would be justified in granting habeas corpus notwithstanding the denial of certiorari in cases where the state court had refused to grant relief. These were cases where resort to state court remedies had failed to afford a full and fair adjudication of the federal contentions raised either because the state afforded no remedy or because the remedy afforded proved in practice unavailable or seriously inadequate." (Italics supplied.)

Judge Parker, who wrote the opinion of the Court below, and who also served as Chairman of the Judicial Conference Committee on Habeas Corpus Procedure, in an Article (*Limiting the Abuse of Habeas Corpus*, 8 F. R. D. 171), outlined the purposes of Title 28, U. S. C., § 2254, as revised, and the abuses it was to correct as follows:

"The thing in mind in the drafting of this section (Title 28, U. S. C. § 2254) was to provide that review of state court action be had so far as possible only by the Supreme Court of the United States, whose review of such action has historical basis, and that review not be had by the lower federal courts, whose exercise of such power is unseemly and likely to breed dangerous conflicts of jurisdiction." (Italics supplied.)

"The provisions of the Revised Code with respect to habeas corpus are very largely a mere codification of the best practice already worked out by court decisions. Even so; they are important in clarifying matters which were subject to misunderstanding and in pointing out how the abuses which have arisen in connection with habeas corpus may be avoided. There is preserved in full the right of persons imprisoned under judgments of state and federal courts to ask release on the ground that they have been denied the sort of trial guaranteed by the Constitution, but effective provision is made against the unseemly incidents which have arisen in the assertion of the right. *There will be no more shopping around from judge to judge with the same old case. There will be no more dragging of a judge into court to defend before another judge the procedure of his court. There will be no more cases of a federal judge in one district passing upon the validity of proceedings of a federal court in another district on no more substantial basis than the unsupported oath of a convicted felon. And last, but not least, there should be no more cases where proceedings of state courts, affirmed by the highest courts of the state, with denial of certiorari by the Supreme Court of the United States, will be reviewed by federal circuit or district judges.* (Italics supplied.)

"It is believed that the effect of these provisions of the Revised Code will be to *protect the courts in the administration of criminal justice from the delays, harassments and unseemly conflicts of jurisdiction which have arisen under recent habeas corpus decisions, without in anywise impairing the rights which it was the purpose of these decisions to protect.* The habeas corpus procedure which led to abuse was laid down by the Supreme Court out of a desire that complete justice be done in every case. The provisions of the Revised Code preserve everything of importance in that procedure while eliminating the abuses to which it has given birth." — (Italics supplied).

It is respectfully submitted under all the circumstances of the petitioner's case that he had a full and fair adjudication of the federal contentions raised by him before the Supreme Court of the State of North Carolina. There was no failure to afford him same. The procedures of the North Carolina Courts afforded him appellate review as a matter of right on the precise question which he now raises before the Federal Court. The petitioner had his full and fair adjudication there and an additional opportunity before the Supreme Court of the United States. It is respectfully submitted that there must be an end to litigation at some place especially when as in petitioner's case every avenue for relief to which he was entitled was utilized by him. The conclusion of the STONE-BREAKER Case is inescapable, if there had been merit in petitioner's contention, certainly relief would have been afforded him at some point.

V.

PETITIONER IS NOT ENTITLED TO THE RELIEF SOUGHT BY HIM ON THE MERITS OF HIS CASE, SINCE HE HAS NOT SHOWN INTENTIONAL, ARBITRARY AND SYSTEMATIC EXCLUSION OF ELIGIBLE PERSONS OF PETITIONER'S RACE FROM PETIT JURIES IN VANCE COUNTY.

On the merits of his case, both before the North Carolina Courts and the Federal District Court, petitioner has failed to show that there was any discrimination against him or members of his race in the preparation of the jury box, the selection of the special venire, the petit jury that tried him or at any stage from his indictment until final judgment.

An examination of the record in the trial court will show that the petitioner in this case was tried in the State Courts in the same manner as any other defendant of any other race. The trial Court was very patient and cautious and inquired thoroughly into the question of jury discrimination. (S. R. 16-63). From the record there is not the slightest evidence as to any



discrimination against the petitioner because of race, but the trial record does strongly indicate and show that, in fact, because of petitioner's race, a much more painstaking and patient research into the facts and details was taken than would probably have been the case of persons of the white race. There is not the slightest indication that the trial court committed any unconstitutional act that caused it to lose jurisdiction. There is not the slightest indication of any violence or mob action; but on the contrary, the trial shows a careful and well-developed hearing, which it is submitted is the very essence of due process of law. There is nothing to show that the judgment of the trial court is invalid. No exceptional circumstances have been shown which would justify a Federal Court in interfering with the administration of justice by a Sovereign State in its own Courts.

The State of North Carolina does not deny that the intentional, arbitrary and systematic exclusion of Negroes from jury service on either the grand jury or the trial panel is an unconstitutional discrimination prohibited by the *equal protection* and *due process clauses* of the Fourteenth Amendment to the Constitution of the United States and the *law of the land* clause of Article 1, Section 17, of the Constitution of the State of North Carolina, this provision of our State Constitution being equivalent to the *due process of law* clause of the Federal Constitution. Long before the happening of the events which led up to the so-called Scottsboro and other cases cited by the defendant, the Supreme Court of North Carolina held, in the year 1902, that the exclusion of persons of the Negro race, where they were excluded solely because of their race or color, is a violation of the Constitution of the United States.

STATE v. PEOPLES, 131 N.C. 784, 42 S.E. 814.

STATE v. DANIELS, 134 N.C. 641, 46 S.E. 743

The question raised goes to the administration of the jury system rather than the statutes upon which the administration is based. Chapter 9 of the General Statutes of North Caro-

lina regulating the methods for the selection of both grand jurors and petit jurors, and their qualifications for jury service, has been held constitutional and not discriminatory by our State Supreme Court and has been before the Supreme Court of the United States and this Court has not said that the statutes themselves are discriminatory or unconstitutional.

STATE v. WALLS, 211 N.C. 487, 191 S. E. 232

(Certiorari denied)

WALLS v. NORTH CAROLINA, 302 U.S. 635, 82 L. ed. 494)

BRUNSON v. NORTH CAROLINA, 332 U.S. 851, 92 L. ed. 1132

Petitioner in the Federal District Court made much of the contention that G.S. 9-1 imposed a mandatory duty on the jury commission of the several counties of North Carolina to do more than refer to the tax returns of the several counties in making up jury lists from which grand and petit juries were to be drawn (F. Tr. 12, 16, 20). This precise question has been decided by the Supreme Court of North Carolina in STATE v. BROWN, 233 N. C. 202, 63 S. E. (2d) 99.

Chief Justice Stacy, in writing the opinion of the Court in STATE v. BROWN, *supra*, met this contention squarely and answered it as follows:

"Whatever may be the holding in other jurisdictions, it is thoroughly settled by our decisions that the provisions of the statute now in focus are directory, and not mandatory, in the absence of proof of bad faith or corruption on the part of the officers charged with the duty of selecting the jury list. S. v. Mallard, 184 N. C. 667, 114 S. E. 17 and cases there cited. Not only has no bad faith or corruption been shown on the part of the officers here, but none has so much as been suggested. S. v. Smarr, 121 N. C. 669, 28 S. E. 549. Hence, the motions to quash and in arrest were properly overruled."

It is when a Negro defendant is deprived, by design of the chance of having Negroes on the jury that the Fourteenth

Amendment to the United States Constitution may be invoked for his protection.

STRAUDER v. WEST VIRGINIA, 100 U. S. 303, 25 L. ed. 664

NORRIS v. ALABAMA, 294 U. S. 587, 79 L. ed. 1074

HOLLINS v. OKLAHOMA, 295 U. S. 394, 79 L. ed. 1500

HALE v. KENTUCKY, 303 U. S. 613, 82 L. ed. 1052

PIERRE v. LOUISIANA, 306 U. S. 354, 83 L. ed. 757

SMITH v. TEXAS, 311 U. S. 128, 85 L. ed. 84

In AKINS v. TEXAS, 325 U. S. 398, 89 L. ed. 1692, the Court uses the words "purposeful discrimination." In NORRIS v. ALABAMA, *supra*, the Court uses the words "long-continued, unvarying, and wholesale exclusion of Negroes from jury service."

It is very generally held that the burden of proof is on the defendant to show an alleged discrimination in the selection of a grand or petit jury.

AKINS v. TEXAS, 325 U. S. 398, 89 L. ed. 1692

MURRAY v. LOUISIANA, 163 U. S. 101, 41 L. ed. 87

There is a presumption that officers in charge of the selection and summoning of a jury or jury panel will be presumed to have performed their duty fairly and justly without discrimination against any race or class. In other words, discrimination in the selection of a jury will not be presumed.

TARRANCE v. FLORIDA, 188 U. S. 519, 47 L. ed. 522, 116 So. 470 (Fla.). (Certiorari denied in 278 U. S. 599, 73 L. ed. 525)

Fairness in selection has never been held to require proportional representation of races upon a jury.

STATE v. KORITZ, 227 N. C. 553, 43 S. E. (2d) 77 (Certiorari denied 92 L. ed. 354)

AKINS v. TEXAS, 325 U. S. 398, 89 L. ed. 1692

VIRGINIA v. RIVES, 100 U. S. 313, 25 L. ed. 667

THOMAS v. TEXAS, 212 U. S. 278, 53 L. ed. 512

ZIMMERMAN v. STATE (Md.), 59 A. (2d) 675

(Certiorari denied 93 L. ed. (Ad. Op. No. 7) 425)

A defendant has no constitutional right to be indicted or tried by any particular jury or by a jury composed in part of members of his race or class.

STATE v. PEOPLES, 131 N. C. 784, 42 S. E. 814

STATE v. SLOAN, 97 N. C. 499

STATE v. LOGAN, 341 Mo. 1164, 111 S. W. (2d) 1101

MARTIN v. TEXAS, 200 U. S. 316, 50 L. ed. 494

"It is unsafe we think, to attach too much significance to abstract mathematical ratios or to the so-called law of recurrences in determining whether there has been arbitrary discrimination in the selection of the juries."

SWAIN v. STATE, 215 Ind. 259, 18 N. E. (2d) 921, 926

The defendant challenged the array of petit jurors and moved the Court that the entire array of special veniremen be quashed and set aside and caused to be issued a subpoena duces tecum to the Chairman of the Vance County Board of Commissioners, the Clerk of said Board, the Clerk of the Superior Court, the county tax collector and the sheriff, all of Vance County, requiring them to bring their several records pertaining to the listing, drawing and summoning of jurors in Vance County and the jury boxes and records pertaining thereto. (S. R. 13 and 14).

When said witnesses, records and jury boxes had been brought into the Court the defendant was given an opportunity to present evidence in support of his motion that the



array of petit jurors and special veniremen summoned from Vance County be quashed and set aside.

F. H. ELLINGTON, Chairman of the Board of Commissioners of Vance County, is quoted as having testified: "I have lived in Vance County since 1915, that is, about 34 years, and during that 34 years I have never known a Negro to be called for jury, grand or petit." (S. R. 16). This evidence is only negative in character but the witness testified affirmatively that he had served on the Board of Commissioners for Vance County for only 20 months "and during the time that I have held this position colored persons were drawn to serve on the jury in Vance County. I do not know who they were but there are a number of them". (S. R. 16). The witness testified further that there had been no purposeful discrimination between the races but that the Commissioners selected names for the jury from the tax books and from the tax lists who were "law abiding citizens, taxpayers and persons of good moral character, and I followed that proceeding in the selection of the names of the colored people." (S. R. 17). H. M. ROBINSON, Clerk of the Board of Commissioners of Vance County for some 19 years, was quoted as testifying: "as Clerk of the Board I am present when persons are drawn for jury duty in Vance County; I don't know when Negroes were drawn for jury duty in Vance County; I write down the names they read to me; I don't know whether any Negroes' names were drawn for jury duty during those 18 years." In addition thereto the witness testified: "I make the list and turn it over to the Chairman of the Board, and each Township has white and colored according to the race all in the same book. And I only prepare a list from the tax books." (S. R. 18). He further testified that he was present when the jury list was revised and purged in July, 1949, and that "This list was made up from both colored and white citizens whose names appear upon the tax scrolls of Vance County who in the opinion of the Commissioners are men of good moral character, men and women of good moral character and qualified to serve as jurors, and who had paid their taxes." (S. R. 21).

He further testified that in the purging and revision of the jury list that no systematic purpose or effort to exclude any member of the colored race was made; that "the jury box from which the special venire was drawn for this trial was composed of both white and colored jurors in fair proportion to the number among the races, and the people who were qualified from both races from a moral standing and character, and moral fitness to serve as jurors". (S. R. 21). The witness also testified "at at the revision of the jury box on the first Monday in July "There weren't anything said by way of discrimination against placing the names of colored people in the jury box, and that there weren't anything placed on them in any way to indicate that the name on the scroll was Negro or white, the only thing there was just the Township number for each one, and that applied to whites as well as Negroes". (S. R. 22).

V The evidence of the other witnesses was of similar import in that it was largely negative in character, the witnesses merely saying that they did not know of any Negroes who had served on the jury in Vance County but admitted that they knew nothing about the composition of the jury list in the box as of July 1st, 1949. While some of the witnesses testified that they had lived in the County all of their lives and had never been called on to serve as jurors, the record is silent as to whether the witnesses were members of the Negro or white race. Most of the persons identified as being qualified to serve on the jury were doctors, dentists, undertakers, embalmers and others exempted under G. S. 9-19 from jury duty. Certain school teachers were pointed out as persons qualified to serve on juries who had not served but the record fails to show whether such persons resided in the county only during the school terms or were actually residents and taxpayers of the county.

The special venire summoned in this case was drawn from the list placed in the July 1st, 1949 jury box, but it will be noted that the petitioner's evidence relates to alleged ir-

regularities and discrimination existing prior to the making up of the 1949 list. To allow the petitioner to show, if he could, that irregularities appeared in the 1949 jury list, the Court ordered the box to be produced in Court and be opened by the Sheriff of the County in the presence of four County Commissioners, the Clerk of the Board of Commissioners and counsel for the petitioner. The petitioner, through his counsel, was permitted to make such examination of the scrolls therein contained as he desired. (S. R. 42).

A large number of scrolls were drawn from the box, including the names of both white and Negroes, and others unidentified as to race. Before or after the names on many of the scrolls appeared a dot which the petitioner contends was placed on the scrolls prior to the time they were put in the jury box for the purpose of identifying them as to race, but the record is silent as to who placed the dots on the scrolls or their purpose. The petitioner's witnesses identified many of the scrolls but were unable to distinguish between members of the white and colored races by such dots. (R. ; App. to Brief, pp. 51-53, C. C. A. 4, No. 6331.)

Only a part of the scrolls were drawn from the box but 104 of these were Negroes. (S. R. 54).

*It is not sufficient for the petitioner merely to show irregularities in the composition of jury boxes prior to July 1st, 1949 but he must show affirmatively that purposeful discrimination was employed or other irregularities existed in the list constituting the 1949 box from which the special venire was drawn. This he has failed to do.* Of the special venire of 100 scrolls drawn from the Vance County 1949 box in the presence of the petitioner and at least one of his attorneys, sixty-three including four Negroes, appeared in the trial Court at the appointed time. The record is silent as to why none of these Negroes sat as members of the trial jury. (S. R. 59) though there is an intimation that one was examined on the voir dire.

This Court in *CASELL v. TEXAS*, 339 U. S. 282, 94 L. ed. 563 (Adv. Sh. 13), quoting from *HILL v. TEXAS*, 316 U. S. 400, 404, 62 S. Ct. 1159, 1161, 86 L. ed. 1159, said:

"The existence of the kind of discrimination described in the Hill case does not depend upon systematic exclusion continuing over a long period and practiced by a succession of jury commissioners. **SINCE THE ISSUE MUST BE WHETHER THERE HAS BEEN DISCRIMINATION IN THE SELECTION OF THE JURY THAT HAS INDICTED PETITIONER**, it is enough to have direct evidence based on the statements of the jury commissioners in the very case. Discrimination may be proved in other ways than by evidence of long continued unexplained absence of Negroes from many panels. The statements of the jury commissioners that they chose only whom they knew, and that they know no eligible Negroes in an area where Negroes made up so large a proportion of the population, prove the intentional exclusion that is discrimination in violation of petitioner's constitutional rights." (*Italics added*).

*PATTON v. MISSISSIPPI*, 322 U. S. 463, 92 L. ed. 76

The respondent's evidence shows affirmatively that eligible persons of the Negro race were not intentionally, purposefully and systematically excluded from petit juries in Vance County, and in particular the special venire drawn from the 1949 Jury box. (R. ; App. to Brief pp. 53-59, C.C.A. 4, No. 6331.)

The petitioner on page 20 and 22 of his brief insists that dots or periods appeared before the names on scrolls representing members of the Negro race for the purpose of identification. This statement is wholly unsupported by any evidence. On the contrary the evidence affirmatively shows that the dots appearing were not used for the purpose of identification and the witnesses were unable to identify the names on such scrolls as either whites or Negroes. /



STATE v. WALLS, 241 N. C. 487, 191 S. E. 232

WALLS v. NORTH CAROLINA, 302 U. S. 635, 82 L. ed. 494

Under the North Carolina practice the trial Court is required at the close of the *voir dire* to make appropriate findings of fact. In the instant case the Court made such findings of fact based on the evidence and denied the petitioner's motion to quash the entire array of the petit jury and special veniremen summoned from Vance County (S. R. 57 through 63). (R. ; App. to Brief, pp. 41-45, C. C. A. 4, No. 6331).

While it is recognized by the State that on a question of this kind this Court will examine the facts and evidence to see if fundamental constitutional rights have been denied, STATE v. SPELLER, 229 N. C. 67, nevertheless, in State and Federal courts great weight is accorded to the findings of the presiding judges who make the initial decisions and have a better opportunity to investigate the facts.

THOMAS v. TEXAS, 212 U. S. 278, 53 L. ed. 512

AKINS v. TEXAS, 325 U. S. 398, 89 L. ed. 1692

In THOMAS v. TEXAS, *supra*, this Court said:

"As before remarked, whether such discrimination was practiced in this case was a question of fact, and the determination of that question adversely to plaintiff in error by the trial court and by the court of criminal appeals was decisive, so far as this court is concerned, unless it could be held that these decisions constitute such causes as amounted to an infraction of the Federal Constitution, which cannot be presumed, and which there is no reason to hold on the record before us. On the contrary, the careful opinion of the court of criminal appeals, setting forth the evidence, justifies the conclusion of that court that the Negro race was not intentionally

or otherwise discriminated against in the selection of the grand and petit jurors. Indeed, there was a Negro juror on the grand jury which indicted plaintiff in error, and there were Negroes on the venire from which the jury which tried the case was drawn, although it happened that none of them were drawn out of the jury box."

In *AKINS v. TEXAS*, *supra*, the Court said:

"As will presently appear, the trancript of the evidence presents certain inconsistencies and conflicts of testimony in regard to limiting the number of Negroes on the grand jury. Therefore, the trier of fact who heard the witnesses in full and observed their demeanor on the stand has a better opportunity than a reviewing court to reach a correct conclusion as to the existence of that type of discrimination. While our duty, in reviewing a conviction upon a complaint that the procedure through which it was obtained violates due process and equal protection under the Fourteenth Amendment, calls for our examination of evidence to determine for ourselves whether a Federal constitutional right has been denied, expressly or in substance and effect, *NORRIS v. ALABAMA*, 294 U. S. 587, 589, 590, 70 L. ed. 1074, 1076, 1077, 55 S.Ct. 579; *SMITH v. TEXAS*, 311 U. S. 123, 130, 85 L. ed. 84, 86, 61 S. Ct. 164, we accord in that examination great respect to the conclusion of the state judiciary, *PIERRE v. LOUISIANA*, 306 U. S. 354, 358, 83 L. ed. 757, 760, 59 S.Ct. 536. That respect leads us to accept the conclusion of the trier on disputed issues unless it is so lacking in support in the evidence that to give it effect would work that fundamental unfairness which is at war with due process'."

We say that at the hearing before the Federal Court nothing new to strengthen petitioner's contention was brought out, but on the contrary the evidence tended to show that petitioner had been afforded every right guaranteed to him by the Federal Constitution. The evidence showed that peti-

tioner had been indicted by a Grand Jury of which two of the members thereof were members of the Negro race. (R. ; App. to Brief, p. 39, C. C. A. 4, No. 6331). It also established the fact that the jury box of Vance County from which was drawn the special venire for Bertie County and from which the petit jury which tried petitioner was selected, was duly purged according to the laws and statutes of North Carolina and that names of members of both races were placed therein without regard to whether they were members of the white or Negro race. (F.Tr. 14, 16, 34, 38). That at this hearing it was established that 145 names of Negroes were in both sections of the Jury Box, *ie*, Box 1 and 2. (F.Tr. 92). That of the 100 jurors constituting the special venire for Bertie County, 7 were members of the Negro race; (R. ; F. Tr. 23) (App. to Brief, p. 33, C. C. A. 4, No. 6331); that 4 of the 7 Negroes so selected reported to Bertie County (R. ; App. to Brief, p. 33, C. C. A. 4, No. 6331); that the 3 who did not report were dead. (R. ; App. to Brief, p. 33, C. C. A. 4, No. 6331). That of the 41 Negroes whose names were contained in Box 2, the evidence shows that the Sheriff of Vance County and his deputies summoned all those drawn for jury duty without regard to race (R. ; App. to Brief, p. 34, C. C. A. 4, No. 6331; F.Tr. 83, 93, 94). That these records show that four Negroes served as members of the Grand Jury from the time the Box was made up until January 1951. (R. ; App. to Brief, p. 34, 35, C. C. A. 4, No. 6331; F.Tr. 82, 95). That the remaining Negroes, except 7 who were not to be found within the county by the Sheriff and four others, one of whom was a fugitive from justice, served as members of jury panels at all but several terms of the Superior Court of Vance County. (R. ; App. to Brief, p. 34-35, C. C. A. 4, No. 6331). That an average of three or four Negroes has served on the jury panel of Vance County during each term of Superior Court, subsequent to the purging of the jury box in July, 1949. (R. ; App. to Brief, p. 34-35, C. C. A. 4, No. 6331; F.Tr. 82, 88, 95).

## CONCLUSION

We do not think there has been shown in this case any gross violation of constitutional right of such a nature as would authorize a Federal Court to disturb the trial in the State Court by a *habeas corpus* proceeding. In the case of *SANDERLIN v. SMYTH*, 4 Cir., 138 Fed. (2d) 729, Judge Parker, speaking for the Court, said:

"The writ of *habeas corpus* may be issued by a federal court or judge in cases where petitioner is imprisoned under the Judgment of a State Court only if it is made to appear, (1) *that there has been such gross violation of constitutional right as to deny the substance of a fair trial and the prisoner has not been able to raise the question on the trial because of ignorance, duress or other reason for which he should not be held responsible*, (2) that he has exhausted his remedies under state law, and (3) that no adequate remedy is available to him under state law, either because state procedure does not provide adequate corrective process or because there are exceptional circumstances, such as local prejudice or an inflamed condition of the public mind, which render it impossible or unlikely for him to obtain adequate protection of his right in the courts of the state, i. e., he is entitled to the writ in the federal courts 'only when the state courts will not, or cannot, do justice'. *United States ex rel. Lesser v. Hunt*, 2 Cir., 117 F. 2d 30, 31; *Moore v. Dempsey*, *supra*." (Italics supplied.)

The result of the whole matter as to the position of the Federal Courts on *habeas corpus* is well stated in the case of *U. S. ex rel. FEELEY v. RAGEN*, 7 Cir., 166 Fed. (2d) 976, where the Court said:

"We should not lose sight of the fact that the Federal courts are being used to invade the sovereign jurisdiction of the States, presumed to be competent to handle their own police affairs, as the Constitution recognized when the police power was left with the States. *We are*



not super-legislatures or glorified parole boards. We as courts look only to the violation of Federal Constitutional rights. When we condemn a State's exercise of its jurisdiction and hold that the exercise of its powers is not in accordance with due process, we are in effect trying the States. It is State action that is on trial, and a decent regard for the coordinate powers of the two governments requires that we give due process to the State. That is the reason that in habeas corpus cases the relator must first show that he has exhausted his State remedies to open the way for the Federal courts to try the State's exercise of its sovereign power. For after all, the State represents the people more intimately than the Federal Government.

"To redress an alleged imbalance between the State's exercise of its power and the rights of the individual, the Federal courts exercise a delicate function, the importance of which points up our duty to consider that imbalance in the light of the rights of organized society through the State Government, representing all the people, as against the relator-defendant. There is no room here for crusaders or the fulfillment of missions. We are to hold the balance true, *Frank v. Mangum*, 237 U. S. 309, 329, 35 S. Ct. 582, 59 L. Ed. 969; *Urquhart, Sheriff v. Brown*, 205 U. S. 179, 183, 27 S.Ct. 459, 51 L. Ed. 760; *Baker v. Grice*, 169 U. S. 284, 290, 291, 18 S.Ct. 323, 42 L. Ed. 748." (Italics supplied).

The petitioner was tried in a court of general jurisdiction in Bertie County, North Carolina, and he raised the constitutional issue which he is now asking this Court to retry. This issue was decided on its merits adversely to petitioner in the State Courts, and being dissatisfied with these decisions, the petitioner is simply asking the Federal Court to use the writ of *habeas corpus* as a substitute for an appeal and thereby retry the issue again. In other words, the Federal Court, according to petitioner's concepts, would be a super court of

appeals. We think that we have clearly shown that this is not the proper use of *habeas corpus*. The petitioner had the precise question before this court reviewed by the Supreme Court of North Carolina. The petitioner availed himself fully thereof, and, as we see it, he cannot complain and assert that he is entitled to retry the case in the Federal Court, especially since the Supreme Court of the United States, having before it a record of all the proceedings and knowing the seriousness of the situation, saw fit to deny petitioner's application for a writ of *certiorari*. The conclusion of **STONE-BREAKER v. SMYTH**, *supra*, relied on by the Court below, is inescapable; certainly relief would have been afforded petitioner at some point had there been merit in his contention.

Respectfully submitted,

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## APPENDIX

### Chapter 7, General Statutes of North Carolina:

§ 7-63. *Original jurisdiction.*—The superior court has original jurisdiction of all civil actions whereof exclusive original jurisdiction is not given to some other court; and of all criminal actions in which the punishment may exceed a fine of fifty dollars, or imprisonment for thirty days; and of all such affrays as shall be committed within one mile of the place where, and during the time, such court is being held; and of all offenses whereof exclusive original jurisdiction is given to justices of the peace, if some justice of the peace shall not within twelve months after the commission of the offense proceed to take official cognizance thereof.

### Chapter 14, General Statutes of North Carolina:

§ 14-21. *Punishment for rape.*—Every person who is convicted of ravishing and carnally knowing any female of the age of twelve years or more by force and against her will, or who is convicted of unlawfully and carnally knowing and abusing any female child under the age of twelve years, shall suffer death: Provided, if the jury shall so recommend at the time of rendering its verdict in open court, the punishment shall be imprisonment for life in the state's prison, and the court shall so instruct the jury.

### Chapter 9, General Statutes of North Carolina:

§ 9-1. *Jury list from taxpayers of good character.* — The board of county commissioners for the several counties, at their regular meetings on the first Monday in June in the year 1947, or the jury commissions or such other legally constituted body as may in the respective counties be charged by law with the duty of drawing names of persons for jury service, at the times of their regular meetings, and every two years thereafter, shall cause their clerks to lay before them the tax returns for the preceding year for their county, and a list of names of persons who do not appear upon the tax lists, who are residents of the county and over twenty-one years of age, from which lists the board of county commissioners or

such jury commissions shall select the names of such persons who reside in the county who are of good moral character and have sufficient intelligence to serve as members of grand and petit juries. A list of the names thus selected by the board of county commissioners or such jury commissions shall be made out by the clerk of the board of county commissioners or such jury commissions and shall constitute the jury list of the county and shall be preserved as such.

The clerk of the board of county commissioners or such jury commissions, in making out the list of names to be laid before the board of county commissioners or such jury commissions, may secure said lists from such sources of information as deemed reliable which will provide the names of persons of the county above twenty-one years of age residing within the county qualified for jury duty. There shall be excluded from said lists all those persons who have been convicted of any crime involving moral turpitude or who have been adjudged to be non compos mentis.

§ 9-2. *Names on list put in box.*—The commissioners at their regular meeting on the first Monday in July in the year nineteen hundred and five, and every two years thereafter, shall cause the names on their jury list to be copied on small scrolls of paper of equal size and put into a box procured for that purpose, which must have two divisions marked No. 1 and No. 2, respectively, and two locks, the key of one to be kept by the sheriff of the county, the other by the chairman of the board of commissioners, and the box by the clerk of the board.

§ 9-3. *Manner of drawing panel for term from box.*—At least twenty days before each regular or special term of the superior court, the board of commissioners of the county shall cause to be drawn from the jury box out of the partition marked No. 1, by a child not more than ten years of age, thirty-six scrolls except when the term of court is for the trials of civil cases exclusively, when they need not draw more than twenty-four scrolls. The persons whose names are inscribed on said scrolls shall serve as jurors at the term of the superior



court to be held for the county ensuing such drawing, and for which they are drawn. The scrolls so drawn to make the jury shall be put into the partition marked No. 2. The said commissioners shall at the same time and in the same manner draw the names of eighteen persons who shall be summoned to appear and serve during the second week, and a like number for each succeeding week of the term of said court, unless the judge thereof shall sooner discharge all jurors from further service. The said commissioners may, at the same time and in the same manner, draw the names of eighteen other persons, who shall serve as petit jurors for the week for which they are drawn and summoned. The trial jury which has served during each week shall be discharged by the judge at the close of said week, unless the said jury shall be then actually engaged in the trial of a case, and then they shall not be discharged until the trial is determined.

§ 9-6. *Jurors having suits pending.*—If any of the jurors drawn have a suit pending and at issue in the superior court, the scrolls with their names must be returned into partition No. 1 of the jury box.

§ 9-7. *Disqualified persons drawn.*—If any of the persons drawn to serve as jurors are dead, removed out of the county, or otherwise disqualified to serve as jurors, the scrolls with the names of such persons must be destroyed, and in such cases other persons shall be drawn in their stead.

§ 9-8. *How drawing to continue.*—The drawing out of partition marked No. 1 and putting the scrolls drawn into partition No. 2 shall continue until all the scrolls in partition No. 1 are drawn out, when all the scrolls shall be returned into partition No. 1 and drawn out and drawn out again as herein directed.

§ 9-19. *Exemptions from jury duty.*—All practicing physicians, licensed druggists, telegraph operators who are in the regular employ of any telegraph company or railroad company, train dispatchers who have the actual handling of either

freight or passenger trains, regularly licensed pilots, regular ministers of the gospel, officers or employees of a state hospital for the insane, active members of a fire company, funeral directors and embalmers, printers and linotype operators, all millers of grist mills; all United States railway postal clerks and rural free delivery mail carriers, locomotive engineers, brakemen and railroad conductors in active service; radio broadcast technicians, announcers, and optometrists, registered or practical nurses in active practice and practicing attorneys at law, and all members of the national guard. North Carolina state guard and members of the civil air patrol, naval militia, officers reserve corps, enlisted reserve corps, and the naval reserves, who comply with and perform all duties required of them as members of the national guard, naval militia, officers reserve corps, enlisted reserve corps, and the naval reserves, shall be exempt from service as jurors.

§ 9-24. *How grand jury drawn.*—The judges of the superior court, at the terms of their courts, except those terms which are for the trial of civil cases exclusively, and special terms for which no grand jury has been ordered, shall direct the names of all persons returned as jurors to be written on scrolls of paper and put into a box or hat and drawn out by a child under ten years of age; whereof the first eighteen drawn shall be a grand jury for the court; and the residue shall serve as petit jurors for the court.

§ 9-29. *Special venire to sheriff in capital cases.*—When a judge of the superior court deems it necessary to a fair and impartial trial of any person charged with a capital offense, he may issue to the sheriff of the county in which the trial may be a special writ of venire facias, commanding him to summon such number of persons qualified to act as jurors in said county as the judge may deem sufficient (such number being designated in the writ), to appear on some specified day of the term as jurors of said court; and the sheriff shall forthwith execute the writ and return it to the clerk of the court on the day when it is returnable, with the names of the jurors summoned.

§. 9-30. *Drawn from jury box in court by judge's order.*—

When a judge deems a special venire necessary, he may, at his discretion, issue an order to the clerk of the board of commissioners for the county, commanding him to bring into open court forthwith the jury boxes of the county, and he shall cause the number of scrolls as designated by him to be drawn from box number one by a child under ten years of age. The names so drawn shall constitute the special venire, and the clerk of the superior court shall insert their names in the writ of venire, and deliver the same to the sheriff of the county, and the persons named in the writ and no others shall be summoned by the sheriff. If the special venire is exhausted before the jury is chosen, the judge shall order another special venire until the jury has been chosen. The scrolls containing the names of the persons drawn as jurors from box number one shall, after the jury is chosen, be placed in box number two, and if box number one is exhausted before the jury is chosen, the drawing shall be completed from box number two after the same has been well shaken.

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No. 620

BENNIE DANIELS AND LLOYD RAY DANIELS,  
*Petitioners,*

*vs.*

ROBERT A. ALLEN, WARDEN, CENTRAL PRISON OF THE  
STATE OF NORTH CAROLINA, RALEIGH, NORTH CAROLINA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

**BRIEF FOR PETITIONERS**

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 626

BENNIE DANIELS AND LLOYD RAY DANIELS,  
*Petitioners,*

*vs.*

ROBERT A. ALLEN, WARDEN, CENTRAL PRISON OF THE  
STATE OF NORTH CAROLINA, RALEIGH, NORTH CAROLINA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

**BRIEF FOR PETITIONERS**

**Opinions Below**

The opinion of the United States District Court for the Eastern District of North Carolina, Raleigh Division, is reported at 99 F. Supp. 208, *sub. nom. Daniels v. Crawford*<sup>1</sup>; the opinion of the Court of Appeals for the Fourth Circuit together with the dissent of Judge SOPER are reported at 192 F. 2d 763.

<sup>1</sup> By order of the Court of Appeals for the Fourth Circuit dated October 13, 1951, Robert A. Allen, the successor to J. B. Crawford as Warden of Central Prison of the State of North Carolina, was substituted as appellee.

## Jurisdiction

The judgment of the Court of Appeals, affirming the order and judgment of the District Court which vacated the writ of habeas corpus theretofore issued by said District Court, dismissed the petition of petitioners for such writ of habeas corpus, and remanded petitioners to the custody of respondent, the Warden of the Central Prison of the State of North Carolina, wherein petitioners are inmates of the death house, under sentence of death by asphyxiation, petitioners having previously been indicted, tried and convicted without recommendation of mercy by juries of the Superior Court, Pitt County, North Carolina for the charge of murder in the first degree, was made and entered on November 5, 1951 (R. 341). Petition for writ of certiorari from this Court to the Court of Appeals was thereafter timely made and certiorari was granted by order of this Court on March 10, 1952 (R. 342) (342 U.S. 941).

The jurisdiction of this Court is conferred by § 1254(1) of Title 28 of the United States Code.

### Statutes Involved

1. § 2241, Title 28, United States Code:

“(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had. . . .

“(c) The writ of habeas corpus shall not extend to a prisoner unless— . . . (3) He is in custody in violation of the Constitution or laws or treaties of the United States.”

2. § 2254, Title 28, United States Code:

“An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a

State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State; or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

### **Statement of the Matter Involved**

William Benjamin O'Neal, a taxicab driver, was murdered some time late Saturday night, February 5, 1949. His body was found in a mutilated condition, due to many knife wounds and heavy blows, several feet from his taxicab. The scene of the crime was near a tobacco barn on a dark, deserted road several miles from Greenville, Pitt County. The body of O'Neal, a white man, was first found before noon of February 6th. Between 1:00 and 1:30 a.m. of February 7th, the petitioner Lloyd Ray Daniels, a 17-year-old illiterate Negro, was arrested by six white police officers and then in the company of three of those officers he was taken to and placed in a jail cell in Williamston, Martin County, 30 miles from Greenville. At some time between 5 and 6 a.m. on the morning of February 8th, the petitioner Bennie Daniels, also a teen-age illiterate Negro, was arrested by four white men and taken by them to the same jail. An indictment charging petitioners with the wilful and premeditated murder of William Benjamin O'Neal was returned by the March Term, 1949, of the Grand Jury of Pitt County, comprised of 18 persons, none of them Negroes (R. 33-4, 315-6).

At the time petitioners were arraigned after indictment before the Superior Court of Pitt County, counsel was ap-

pointed for them. Petitioners pleaded to the charge but their trial was continued to the next succeeding Term as the petitioners were committed to the State Hospital for Insane Negro persons for the purpose of examining into their mental condition. Thereafter petitioners obtained their own counsel to replace court-appointed counsel and on March 24, 1949, the Superintendent of the aforesaid Hospital reported that petitioners had sufficient intelligence to distinguish right from wrong.

On the calling of the case for trial at the May 30th Term, 1949, of the Superior Court of Pitt County, the petitioners moved to quash the indictment and challenge to the array of petit jurors on the grounds that Negroes had been systematically and arbitrarily excluded from the grand and petit juries of Pitt County, solely for reasons of race or color, thereby depriving petitioners of the equal protection of the laws guaranteed to them by the Fourteenth Amendment to the United States Constitution (R. 303). A hearing was held before the Honorable CLAWSON L. WILLIAMS, Judge Presiding, prior to the selection of the petit jury, upon the aforesaid motion and evidence was presented by petitioners and by the State. At the conclusion of the hearing the motion to quash the indictment and the challenge to the array were both denied (R. 303-320). Thereafter a petit jury was impanelled, which jury included one Negro.

At the trial the State offered in evidence alleged oral and signed confessions by petitioners that they had murdered O'Neal (R. 273-6). Upon timely objection by counsel for petitioners, the trial judge held a hearing without the presence of the petit jury on the question of the admissibility of the alleged confessions and determined them to be voluntary and, therefore, competent and admissible (R. 272). The State introduced in evidence the alleged confessions of the petitioners and other evidence intended to corroborate the



charge of murder. Petitioners testified on their own behalf and denied guilt of the crime as charged, denied ever having signed the alleged confessions, asserted that the self-incriminating statements which they may have made orally were induced by force and fear, and offered in evidence testimony tending to establish their innocence of the crime. At the conclusion of the trial motions to dismiss were denied (R. 3), and the case submitted to the jury upon a lengthy set of instructions which took from the jury the question whether the alleged confessions were voluntary (R. 3). The jury found the petitioners guilty of murder in the first degree as charged, without recommendation of mercy, and sentence of death was imposed on the 6th day of June, 1949 (R. 39-40, 41, 70-2).

Upon the pronouncement of judgment, counsel for petitioners in open court orally served notice of appeal (R. 40, 41-2). The judge presiding thereupon allowed petitioners sixty days from the date of judgment in which to make and serve a statement of the case on appeal in accordance with the local practice; the State was allowed forty-five days thereafter to prepare and serve amendments to the petitioners' statement or a counter-statement (R. 40, 42). The transcript of the record made in the trial court comprised four volumes, totalling 704 typewritten pages. Counsel for petitioners received the entire transcript from the court reporter on or about fifty days after June 6th (R. 73). Thereafter counsel for petitioners prepared a statement of the case on appeal and served the same upon the Solicitor of Pitt County on August 6, 1949 (R. 73). Within forty-five days thereafter, the Solicitor served and filed 132 exceptions to the case on appeal and, in addition, moved to strike the case on appeal on the grounds that the last day for petitioners to serve such statement upon the Solicitor was August 5th, one day prior to the date of service (R. 74). A hearing

on the motion was held on September 29, 1949, before WILLIAMS, J., and at the conclusion thereof the motion of the Solicitor to strike petitioners' case on appeal was granted, and an order entered thereon on the grounds that the statement had been served one day late (R. 42-44). The effect of the order striking the statement of the case on appeal was to preclude an appeal on the merits to the North Carolina Supreme Court.

On September 27, 1949, prior to the order of WILLIAMS, J., petitioners filed with the Supreme Court of North Carolina a petition for writ of certiorari for the purpose of extending the time within which to docket their appeal in the said Supreme Court (R. 45-47); and subsequent to the order of September 29th of WILLIAMS, J., a supplemental petition for a writ of certiorari was filed in the said Supreme Court which recited the order of WILLIAMS, J., and prayed the North Carolina Supreme Court for leave to bring the cause before the said Court (R. 47-51).

In a decision dated November 2, 1949 (*State v. Daniels*, 231 N.C. 17, 56 S.E. 2d 2), the petition for certiorari was denied. In the opinion by SEAWELL, J., for the North Carolina Supreme Court, the reasons assigned by counsel for petitioners for the one day delay were noted, considered, and rejected, and the petition for certiorari was denied without examination of the errors assigned. The court indicated, however, that serious federal questions were presented. The objections made to the exclusion of Negroes from the grand and petit juries, and to the admission in evidence of the alleged confessions were noted and the court then wrote as follows:

"... Both these objections involve questions of invasion of constitutional rights which, in the instant case, can be presented only through matter extraneous to the record. Ordinarily in this situation resort may be had to writs of error coram nobis . . ."

"Since here the authority for the writ stems from the supervisory power given the Supreme Court in the section of the Constitution cited, it is necessary that an application be made to this Court for permission to apply for the writ to the Superior Court in which the case was tried. In re Taylor, supra, 230 N.C. 566, 569, 53 S.E. 2d 875, 859. It is granted here only upon a 'prima facie showing of substantiality', and it is observed in the Taylor case last cited: 'The ultimate merits of the petitioner's claim are not for us, but for the trial court.'"

"On consideration in the trial court, if the decision is adverse to the petitioners, the Court will find the facts, and an appeal to this Court will lie as in other cases."

Subsequently, in accordance with the foregoing suggestion, upon notice to the Attorney General of North Carolina and the Solicitor of Pitt County, petitioners filed a petition with the Supreme Court of North Carolina for writ of error *coram nobis* in the Superior Court of Pitt County (R. 51-57). That petition set forth the errors of law and fact committed by the trial court and designated the federal questions presented.

The latter petition was denied in a *per curiam* opinion (*State v. Daniels*, 231 N.C. 241, 56 S.E. 2d 646), dated December 14, 1949, which described briefly the proceedings and then held:

"Their petition does not make a *prima facie* showing of substance which is necessary to bring themselves within the purview of the writ. Citations, supra."

The petition is insufficient to justify the Court in issuing the writ and instigating the incident procedure in the court below. *State v. Daniels*, supra; *In re Taylor* (229 N.C. supra). (R. 57-58).

Thereafter the Attorney General of North Carolina moved that the case and record be docketed and the appeal

Dismissed. Upon said motion the North Carolina Supreme Court held (*State v. Daniels*, 231 N.C. 509, 57 S. E. 2d 653).

"We have carefully examined the record filed in this case and find no error therein. For the causes stated the motion of the Attorney General is allowed; the judgment of the lower court is affirmed and the appeal is dismissed." (R. 60).

On January 31, 1950, Mr. Chief Justice VINSON of the United States Supreme Court signed an order, upon motion of petitioners, extending their time to March 14, 1950 to file with that Court a petition for a writ of certiorari from all of the foregoing judgments; by order dated March 2, 1950, Chief Justice STACEY of the North Carolina Supreme Court stayed the sentence of death pending the disposition of the petition to the United States Supreme Court.

In its brief upon the aforesaid petition, the State of North Carolina asserted the following:

"Since the Supreme Court of North Carolina merely held that the petition was insufficient, there is no reason why the Petitioners cannot now avail themselves of this remedy [petition to the North Carolina Superior Court for writ of error *coram nobis*] if they will file a proper and sufficient petition before the Supreme Court of North Carolina. The Respondent, therefore, contends that the Petitioners have never exhausted their remedies afforded by the Supreme Court of North Carolina for a review of this question. The Supreme Court of North Carolina has, therefore, not passed upon the constitutional issues now raised by the Petitioners." *Daniels, et ano. v. State of North Carolina*, United States Supreme Court, October Term, 1949, No. 412, Misc., Respondent's Brief, p. 28.

On May 8, 1950, this Court denied the aforesaid petition for writ of certiorari without opinion. *Daniels v. North Carolina*, 339 U.S. 954.



Petitioners thereupon submitted another petition to the Supreme Court of North Carolina for a writ of error *coram nobis* in order to obtain a review, for the first time, upon the merits of the constitutional issues raised (R. 62). But the said petition was denied by a decision of the North Carolina Supreme Court dated May 24, 1950, wherein the North Carolina Supreme Court indicated that it considered that the second petition for a writ of error *coram nobis* presented no new facts and that said petition was therefore insufficient. *State v. Daniels*, 232 N.C. 196, 59 S. E. 2d 430 (R. 62-64).

Subsequent to the denial of petitioners' second petition for writ of error *coram nobis*, petitioners initiated the instant proceeding in the District Court of the United States for the Eastern District of North Carolina, Raleigh Division. In connection with their petition for writ of habeas corpus the District Court authorized petitioners to proceed in forma pauperis and granted them a stay of execution. Thereafter the writ was issued by the District Court and the stay of execution continued (R. 64-65). Respondent filed his return to the writ and his answer to the petition was made on June 20, 1950 (R. 19-64, 66, 69-72).

In their petition for habeas corpus petitioners raised the following grounds:

- (1) That Negroes were purposefully and systematically excluded from grand and/or petit juries in Pitt County, including the grand jury which indicted and the petit jury which convicted petitioners, solely for reasons of race or color and that petitioners were therefore denied the equal protection of the laws guaranteed to them by the Fourteenth Amendment to the United State Constitution;
- (2) That the alleged confessions admitted in evidence upon the said trial were obtained under circumstances which were actually or inherently coercive and that the

aforesaid alleged confessions were therefore involuntary and the admission thereof in evidence constituted a denial of due process of law;

(3) That the instruction of the trial judge to the jury that the alleged confessions were voluntary for all purposes deprived petitioners of their right to trial by jury in a capital case in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution;

(4) That the refusal by the North Carolina Supreme Court to entertain an appeal on the merits by petitioners from their convictions was, in view of the statutory right to such appeal, a violation of the equal protection of the laws guaranteed to petitioners by the Fourteenth Amendment to the United States Constitution.

Hearings were held on the aforesaid petition and the return thereto on December 18, 1950 through December 21, 1950 and, again, on May 18, 1951. Evidence was introduced by petitioners and respondent. In connection with the submission of evidence by petitioners on the aforesaid matters raised in the petition for writ of habeas corpus, the respondent moved to dismiss the petition and to exclude from evidence any matters which had been subject to inquiry upon the initial trial (R. 67-69). The motion to dismiss was denied and the motion to exclude the evidence was denied by the trial judge (R. 82, 88-89); he therefore proceeded to a hearing of the issues raised on the merits.

On July 14, 1951 the District Court filed an order vacating the writ theretofore issued, dismissed the petition, and remanded the petitioners to respondent for further proceedings under the judgment of the Superior Court of North Carolina (R. 95-96); and on that same date filed its Findings of Fact and Conclusions of Law (R. 77-83) and Memorandum Opinion (R. 83-95). The District Court had heard the petition on the merits but in its decision relied primarily on

the view that the issues here raised had been passed on by the North Carolina Supreme Court and by the United States Supreme Court in the denial of certiorari.

Notice of appeal to the Court of Appeals for the Fourth Circuit was then duly and timely filed. The District Court authorized the appeal by allowing petitioners' application for a certificate of probable cause and simultaneously stayed execution of the judgment and sentence of death (R. 96-97). Permission to prosecute the appeal in *forma pauperis* was granted by order of the Court of Appeals for the Fourth Circuit made on August 28, 1951. The appeal was heard on October 12, 1951, and the judgment of the District Court affirmed by decision of the Court of Appeals on November 5, 1951 (R. 341). PARKER, C. J., wrote the opinion for the majority of the Court which was stated to be based exclusively on "the procedural history of the case" (R. 324) and concluded that the Court answered in the negative the sole "question involved . . . of permitting persons who have been represented by counsel and who have had the trial court pass on the identical questions that they wish to raise by habeas corpus to use that writ in lieu of an appeal to review the action of the trial court on those questions" (R. 326-327). A dissenting opinion was filed by Judge SOPER (R. 334-340). By order dated November 30, 1951, the Court of Appeals stayed its mandate for thirty days pending the filing with this Court of the instant petition for certiorari (R. 341-342).

Petitioners thereupon filed with this Court their petition for writ of certiorari and for permission to proceed in *forma pauperis*. The petition was granted as was leave thus to proceed (R. 342):

### Questions Presented

1. Petitioners failed to comply with the local practice of the courts of North Carolina requiring, as a condition of

appeal, service of a statement of the case on appeal within sixty days of judgment in that here service was made on the State on the sixty-first day after the judgment of conviction of petitioners in the Superior Court of Pitt County, North Carolina; though the said service was accepted, the one day delay therein resulted in the dismissal of the appeal and in the foreclosure of the petitioners from any review in the courts of North Carolina of the constitutional issues raised by their convictions, whether by appeal, certiorari, habeas corpus, error coram nobis, or otherwise:

(A) Does the one day delay in service also bar petitioners from any federal review of their convictions and death sentences by habeas corpus?

(B) Have petitioners satisfied the requirements of Section 2254, Title 28 of the United States Code, in that they have exhausted all available state remedies and/or are there here present extraordinary circumstances which warrant the granting of the writ notwithstanding any failure to exhaust such remedies?

2. Whether a judgment of conviction in a state capital prosecution may be challenged collaterally in a federal habeas corpus proceeding on the grounds that Negroes have been excluded, for reasons of race and color only, from the grand and/or petit juries of the county wherein the conviction was obtained?

3. Whether a judgment of conviction in a state capital prosecution may be challenged collaterally in a federal habeas corpus proceeding on the grounds that involuntary confessions of petitioners were admitted in evidence against petitioners?

4. Whether a judgment of conviction in a state capital prosecution may be challenged collaterally in a federal habeas corpus proceeding on the grounds that petitioners were deprived of the right to trial by jury by the charge of



the trial judge wherein the issue whether petitioners' alleged confessions were voluntary was taken from the jury?

5. Whether a judgment of conviction in a state capital prosecution may be challenged collaterally in a federal habeas corpus proceeding on the grounds that petitioners were unreasonably deprived of the right to appeal accorded by the laws of the State of North Carolina?

6. Whether the evidence upon the original trial herein and/or upon the federal habeas corpus proceeding shows:

(A) That Negroes were purposefully and systematically excluded from grand and/or petit juries in Pitt County, including the grand jury which indicted and the petit jury which convicted petitioners, solely for reasons of race or color and that petitioners were therefore denied the equal protection of the laws guaranteed to them by the Fourteenth Amendment to the United States Constitution;

(B) That the alleged confessions admitted in evidence upon the said trial were obtained under circumstances which were actually or inherently coercive, and that the aforesaid alleged confessions were therefore involuntary and the admission thereof in evidence a denial of due process of law;

(C) That the instruction of the trial judge to the jury that the alleged confessions were voluntary for all purposes deprived petitioners of their right to trial by jury in a capital case in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution;

(D) That the refusal by the North Carolina Supreme Court to entertain an appeal on the merits by petitioners from their convictions was, in view of the statutory right to such appeal, a violation of the due process of law and equal protection of the laws guaranteed to petitioners by the Fourteenth Amendment to the United States Constitution.

### Specification of Error

The Court of Appeals for the Fourth Circuit erred in affirming the judgment of the District Court dismissing the petition for a writ of habeas corpus to discharge petitioners from the custody of respondent.

### Summary of Argument

The evidence adduced herein establishes the following: Negroes were intentionally excluded from the grand and petit juries of Pitt County, North Carolina, wherein petitioners were indicted and convicted; petitioners were convicted upon the basis of alleged written confessions which were obtained under circumstances actually or inherently coercive; the charge of the state court trial judge to the jury on the question of the voluntariness of petitioners' alleged confessions took that question from the jury and was therefore tantamount to a directed verdict of guilt; and petitioners were unreasonably and unfairly deprived of their right to appeal to the Supreme Court of North Carolina from their convictions. Petitioners have never obtained a review on the merits concerning the foregoing matters in the courts of the State of North Carolina and it is conceded by respondent there is presently not available to petitioners any remedy or procedure in the aforesaid courts whereby petitioners can obtain redress for the gross and flagrant violation of their constitutional rights in the proceedings wherein they were convicted and sentenced to death. In the foregoing circumstances petitioners raise questions which warrant the exercise of federal habeas corpus jurisdiction. Such jurisdiction is not barred by Section 2254 of Title 28 of the United States Code in that petitioners have fully exhausted their state remedies; even if it could be said that they have failed to exhaust the state remedies heretofore available to them, petitioners make a sufficient showing under Section 2254 of the kind of "ex-

ceptional circumstances" to invoke federal habeas corpus jurisdiction. To date petitioners have been foreclosed from any review—whether state or federal—primarily, if not exclusively, because after timely filing of notice of appeal they served the statement of the case on appeal required by local practice one day late. The one day delay worked no hardship or prejudice to the State in any manner or fashion. In the interests of elementary justice and fair play, this Court should rectify a situation wherein, because of a procedural oversight trivial and inconsequential in nature, men are to be sent to their deaths without benefit of review of serious and grave constitutional infirmities in the procedures whereby they were convicted.

## ARGUMENT

### I

**Petitioners' Sentence of Death, If Allowed to Stand, Will Deprive Them of Life Without the Due Process of Law and the Equal Protection of the Laws Guaranteed to Petitioners by the Fourteenth Amendment to the United States Constitution**

Although the lower federal courts relied principally upon the "procedural history of the case" to deny habeas corpus, we think review of the substance of petitioners' claims a necessary predicate to a consideration of the procedural posture of this cause. The import accorded technicalities frequently depends upon the equity and the gravity of the interest allegedly impeded by such technicalities. Thus, in a case closely paralleling this one procedurally, the Court, impressed by the evident unfairness of the result reached below, declared it would "make such disposition of the case as justice requires" and proceeded to extricate the merits from a procedural impediment strikingly similar to the one at bar. *Patterson v. Alabama*, 294

U.S. 600. We think the facts here so overwhelmingly demonstrative of the deprivation of fundamental constitutional rights that they warrant priority in treatment so as to provide the context within which the alleged procedural barriers must be considered.

## A

**Negroes were purposefully and intentionally excluded from grand and/or petit juries in Pitt County solely for reasons of race and color:**

The record upon the habeas corpus proceeding leaves no scintilla of doubt that in Pitt County, North Carolina, persons of the Negro race were and continue to be excluded from grand and petit juries. Evidence produced on this score by petitioners is so conclusive that respondent has at no point heretofore challenged in this proceeding petitioners' assertion that they were indicted and convicted by juries selected upon the basis of racial discrimination.

Petitioners have shown that although Negroes comprised 44.2% of the total population of Pitt County 21 years or over and approximately one-third of the 1946 tax list for the County<sup>2</sup> (R. 312-3), still no Negro had ever served on a grand jury in Pitt County (this remained true to the date of the hearing) (R. 121, 307) and Negroes constituted less than 1% of Pitt County petit jurors; no Negroes were on the grand jury which indicted petitioners and only one served on the petit jury which rendered the verdict. This much was shown at the criminal prosecution and affirmed at the habeas corpus hearing.

The further evidence in this proceeding makes clear that the small percentage of Negroes on Pitt County juries is due directly and entirely to the infinitesimal percentage of

<sup>2</sup> Chap. 9, § 1 of the North Carolina General Statutes makes the county tax lists the principal source to be used by the jury commissioners for the preparation of a jury list.



Negroes on the jury list compiled by the jury commissioners. Exhibits P-6(a) through P-6(u) at the habeas corpus proceeding (R. 101-6) show that the 1947 jury list—from which was drawn the grand and petit jurors who indicted and convicted petitioners—had at least 144 but no more than 186 Negroes out of a total of 10,000 (R. 182-6). Negroes, therefore, comprised less than 2% of the Pitt County jury list for 1947; and the evidence indicates that the percentage was less in previous years (R. 208, 212-5).

Moreover, the proof negates any suggestion that Negroes in Pitt County, as a class, did not possess the necessary mental qualifications for jury duty. It is not necessary for petitioners to rely exclusively on the rejection as a "violent presumption" any suggestion that Negroes as a class are unfit for jury duty. *Neal v. Delaware*, 103 U.S. 370, 397; *Norris v. Alabama*, 294 U.S. 587, 599. The evidence shows that the literacy rate among Pitt County Negroes in 1930 was 74.2% (U. S. Census, 1930, Table 13, p. 30). Respondent will concede that by 1947 that percentage was considerable higher, particularly in view of the census figures in evidence depicting the great rise in school attendance among Negroes in North Carolina from 1900 to 1940 (U. S. Census, 1940, Table 12, p. 25). The objective indicia of literacy, occupation and schooling of Negroes in Pitt County, to be found in the 1930 and 1940 United States Census, destroy any possible suggestion that none or only a tiny fraction of those Negroes was qualified for jury service. Indeed, the habeas corpus record shows that in several instances Negroes acknowledged to be qualified for jury duty by the jury commissioner authorized to compile the jury list, did not appear on that list (R. 198-9, 206-7, 209-211). There remains only the obvious—Negroes were excluded almost completely from Pitt County juries solely because of the color of their skins. "... chance or accident could hardly have accounted for the continuous omissions of

negroes from the grand jury lists for so long a period . . .” *Hill v. Texas*, 316 U.S. 400, 404; see also *Smith v. Texas*, 311 U.S. 128, 131. In the face of such overwhelming evidence of discrimination, the denials by the commissioners of any intent to discriminate is unavailing for otherwise the Fourteenth Amendment would be “but a vain and illusory requirement”. *Norris v. Alabama*, 294 U.S. 587, 598.

That exclusion of Negroes from juries solely because they are Negroes deprives a Negro defendant of the equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution is so well established that where such exclusion is found, the Court’s decision consists only of citation of authority without discussion. See, e.g., *Ross v. Texas*, 341 U.S. 918; *Shepherd, et al. v. Florida*, 341 U.S. 50; *Brunson, et al. v. North Carolina*, 333 U.S. 851; see also *Virginia v. Rives*, 100 U.S. 313, 322; *Strauder v. West Virginia*, 100 U.S. 303, *Ex parte Virginia*, 100 U.S. 339; *Neal v. Delaware*, 103 U.S. 370; *Bush v. Kentucky*, 197 U.S. 110; *Gibson v. Mississippi*, 162 U.S. 565, 584, 591; *Carter v. Texas*, 177 U.S. 442; *Martin v. Texas*, 200 U.S. 316, 321; *Norris v. Alabama*, 294 U.S. 587; *Hale v. Kentucky*, 303 U.S. 613; *Pierre v. Louisiana*, 306 U.S. 354; *Smith v. Texas*, 311 U.S. 128; *Hill v. Texas*, 316 U.S. 400; *Patton v. Mississippi*, 332 U.S. 463. Just as clear as the proposition of law stated is its applicability to this case. *Brunson, et al. v. North Carolina*, 333 U.S. 851, demonstrates the point conclusively. That case arose out of Forsythe County, North Carolina, only shortly before the trial of the petitioners herein. The record there shows convictions of five Negroes for misdemeanors and minor offenses. Upon objection to the composition of the juries, the evidence was that of total exclusion of Negroes from grand juries and Negroes constituting less than 1% of petit jurors. One Negro served on

the convicting jury. An analysis of the jury list showed in excess of 2% Negroes. Negroes were 45% of the population and about 20% of the taxpayers eligible for jury duty. On this set of facts the Court reversed, with an opinion consisting of citations alone. Whatever differences exist between the facts of *Brunson* and this case strengthen petitioners' assertion of discriminatory exclusion of Negroes from Pitt County juries.

Two further factors were developed at the habeas corpus hearing which also render vulnerable the composition of Pitt County juries:

In the first place it is undisputed that the jury commissioners uniformly rejected as jurors persons whom they or their consultants did not personally know and that the commissioners neither investigated to ascertain the qualifications of such persons nor did they consult with members of the Negro community for such purpose;<sup>3</sup> in Pitt County the natural, if not intended effect of such procedure was to eliminate from the jury list a very substantial segment of that Negro community (R. 129, 130, 191, 192, 195, 196, 197, 202, 204, 209, 211-2). In the light of the relatively small percentage of Negroes on Pitt County jury lists and juries, and the total absence of Negroes from Pitt County grand juries, the failure of the commissioners diligently to ascertain the jury qualifications of those Negroes whom they did not know was, under the decisions of this Court, a failure "to perform their constitutional duty . . . not to pursue a course of conduct in the administration of their office which would operate to discriminate in the selection of jurors on racial grounds." *Hill v. Texas*, 316 U.S. 400, 404; *Smith v. Texas*, 311 U.S. 128, 132; *Cassell v. Texas*, 339 U.S. 282, 287-289.

The second factor developed upon the hearing is the

<sup>3</sup> One commissioner questioned two Negro educators, but only to learn which Negro school teachers were residents of his district (R. 202).

close correlation between the percentage of Negroes on the jury and voting registration lists of Pitt County. While the applicable statute requires the use of the county tax list as a primary source for the jury list; the evidence is decisive that at least the Negro section of the Pitt County tax list for 1946 was not used and that whatever Negroes did appear on the jury list came from the voting registration list (see, e.g., R. 205, 216-221). Cf. *Patton v. Mississippi*, 332 U.S. 463, 467, 468. Moreover, the percentages of Negroes on the jury and registration lists, respectively, were so close to identity as to demonstrate a deliberate design to limit the percentage of Negroes on jury lists to the percentage on the registration list. Thus the percentages of both are above 1% and below 2% (R. 114-5, 118, 186, 312). This attempt to accomplish "proportional representation" is improper and invalid. *Cassell v. Texas*, 339 U.S. 282, 286-287; *Shepherd, et al. v. Florida*, 341 U.S. 50.

The facts in this case allow no conclusion other than that in Pitt County Negroes were not deemed eligible nor were they selected for jury duty solely on the basis of their qualifications therefor. Nothing but racial discrimination can explain the gap between the number of Negroes, patently eligible and qualified to be jurors and the number chosen therefor. But since *Neal v. Delaware*, authorities responsible for such a condition disclaim any intent to discriminate and attempt to substitute "ingenious and ingenuous" explanations for the exclusion of Negroes from juries. Failure on their part to do so would be to admit the commission of a crime (18 U.S.C.A. § 243) as well as jeopardize the jury system molded to their purposes. Consequently, this Court begins rather than ends its inquiry with the self-serving declarations of the jury commissioners. Any inquiry into the facts must, of course, be with



full cognizance that petitioners, of necessity, had to call upon and prove their case through those self-same commissioners whom petitioners contend practiced illegal and unconstitutional racial discrimination in the exercise of their official duty. It cannot be expected, therefore, that the record here will contain any explicit avowal of discrimination—such discrimination, if present, can be gleaned only if the Court is prepared to make those reasonable inferences which fairly evolve from the facts. Petitioners submit that so viewed the record contains every proof, apart from explicit avowals, of racial discrimination in the selection of past and present jurors in Pitt County. }

## B .

**The alleged confessions of petitioners were obtained under actually and inherently coercive circumstances.<sup>4</sup>**

The murder of William Benjamin O'Neal occurred late in the night of Saturday, February 5, 1949 (S. Tr. 406).<sup>5</sup> The testimony of Sheriff Tyson of Pitt County, where the crime was committed, was that the police had received an undisclosed tip which led them to search out the petitioners (S. Tr. 404). On Sunday, February 6, several officers went to the home of Lloyd Daniels and there questioned his mother as to his whereabouts (S. Tr. 574-6). On the Saturday night of the murder, Bennie had slept at the home of Lloyd (S. Tr. 500) and then Sunday afternoon the two had gone into the City of Greenville (S. Tr. 449; R. 135). When questioned Lloyd's mother had notified the police that Lloyd had gone to see his sister (S. Tr. 575-6). At the home of Lloyd's sister, Lloyd and Bennie

<sup>4</sup> Except where otherwise indicated, the facts recited in this point are either admitted or uncontradicted.

<sup>5</sup> Pages of the transcript of the criminal trial, which was put in evidence at the hearing (R. 24) and is part of the unprinted record before the Court, will hereinafter be referred to as "S. Tr."

learned that men bent on violence were looking for them to avenge the killing of O'Neal (S. Tr. 449, 503-4, 531-2; R. 136). They went down to the railroad tracks together, anxious and concerned about the threat of which they had heard, and while Bennie decided to remain in the nearby woods for a while, Lloyd went back into town and took a bus to the home of his girl friend (S. Tr. 449, 529, 533; R. 136). He arrived there 6:35 P.M. on the Sunday of February 6th (S. Tr. 335). It was at this home that he was arrested by at least six white officers (R. 143, 156) of whom at least three were armed (S. Tr. 203, 249, 367).

Lloyd's arrest was made sometime between 1:00 A.M. and 1:30 A.M., February 7th (R. 155). The arrest was concededly made without a warrant (R. 152-3, 168). Lloyd was handcuffed (S. Tr. 203, 249, 367; R. 137) and he and the officers walked about a mile through the night to where the police car was parked (S. Tr. 206; R. 156, 164-5). According to the police, Lloyd was warned that whatever he would say might be used against him (S. Tr. 239; R. 157; cf. S. Tr. 449, 221-223), but it is admitted that he was not told where he was being taken,<sup>6</sup> and that he was not told of his right to stand mute or of his right to the advice of friends or counsel (S. Tr. 369; R. 165).<sup>7</sup>

"Q. He didn't know where you were going? A. (Sheriff Tyson) No.  
Q.. You didn't tell him? A. No.  
Q. And he didn't ask you? A. No.  
Q. It was dark out there? A. Yes." (S. Tr. 204; see also S. Tr. 295, 449).

<sup>7</sup> § 15-47 of c. 15, Art. 6, of the General Statutes of North Carolina provides:

"Upon the arrest, detention, or deprivation of the liberties of any person by an officer of this state, with or without warrant, it shall be the duty of the officer making the arrest to immediately inform the person arrested of the charge against him . . . ; and it shall be the duty of the officer making the arrest to permit the person so arrested to communicate with counsel and friends immediately, and the right of such persons to communicate with counsel and friends shall not be denied."

Upon reaching the police car after his arrest, Lloyd was placed in the back seat with Officer Gibbs and in the front seat were Officer Manning and Sheriff Tyson (R. 157). Lloyd remained handcuffed; each of these police officers was armed (S. Tr. 203, 249, 367; R. 166, 242). The officers testified that after ten minutes in the car, Lloyd volunteered freely, and without coercion by threat or promise, to confess (R. 157, 243, 247-8), and Officer Gibbs stated that he wrote down Lloyd's statement which was ultimately marked by Lloyd with his sign (S. Tr. Ex. 32; R. 176). Lloyd denied having made any voluntary confession en route to Williamston (S. Tr. 221-229, 450-452; R. 138-9). His testimony was that Gibbs threatened to kill him or his mother unless he admitted the murder of O'Neal (S. Tr. 221-223; 225-229, 450-451; R. 138-9). Lloyd also denied having annexed his mark to the statement prepared by Gibbs.<sup>8</sup> On the trip during which Lloyd allegedly confessed the police car "broke down" for about thirty minutes and during that period Tyson and Manning went out to inspect the car and Gibbs was left alone with Lloyd in the back seat (S. Tr. 208, 211-229, 242-243, 295, 450-451; R. 158-9, 244). By some fortuitous circumstance the car broke down in a deserted area with only one house nearby

<sup>8</sup> The evidence strongly supports Lloyd's version of the facts and makes Gibbs' version virtually incredible. Thus, while Gibbs swore that the statement was in the words of Lloyd (S. Tr. 370-371), it is abundantly clear that Lloyd could not possibly have used the language contained in Ex. 32 (S. Tr. 363-364). The failure to arraign or otherwise bring Lloyd before a hearing officer after the alleged confession also impairs Gibbs' story as does the circumstance that Gibbs did not inform Tyson, the Sheriff, of Lloyd's allegedly signed confession (S. Tr. 245, 298, 376). Notably absent from the alleged confession of Lloyd are the signatures of any witnesses—a practice meticulously followed in other instances in this case (S. Tr. 364, 452); and the efforts by Gibbs to obtain statements of a confession by Lloyd from others even after Lloyd's alleged confession hardly sustains Gibbs' testimony (S. Tr. 336, 367). Under all the circumstances, this Court is at liberty to disregard the patent fabrication that Lloyd signed a confession on February 3th. *Norris v. Alabama*, 294 U.S. 587, 593; *Ward v. Texas*, 316 U.S. 547, 553; *Akins v. Texas*, 325 U.S. 398, 402.

(S. Tr. 208). Subsequently, at an undisclosed time (S. Tr. 240), the prisoner was brought to the jail at Williamston and there put in a cell (R. 165).<sup>9</sup> Tyson testified that Lloyd was thus transported because Tyson had been notified "feeling was running pretty high in Greenville. I didn't think it would be safe to bring him back to Greenville" (R. 165-6; see also R. 177). Concededly Lloyd was not thereupon arraigned or brought before a magistrate as required by the law of North Carolina (R. 166-7).<sup>10</sup>

Bennie remained in the woods until late Sunday night, February 6th, when he went to the home of his cousin and then to his own home (S. Tr. 505, 544-546; R. 146). There he told his mother of the threats against his life that he had heard of in Greenville (S. Tr. 505, 546). Fearful that police or a mob in search for Bennie might also lynch her and the members of her family,<sup>11</sup> Bennie's mother told him to go to the farm of a neighbor; the latter, in turn fearful of trouble, sent him to another farm (R. 147). It was there that Bennie was picked up at about 5:00 A.M. on Tuesday morning, February 8th (R. 159).

Bennie was arrested by four white men, including at least one armed officer (S. Tr. 215, 219, 258, 259, 270, 365;

<sup>9</sup> The murder was committed a few miles from Greenville, which is the seat of Pitt County (R. 165); the petitioners lived in and were tried in Pitt County. When arrested, however, they were taken to Williamston which is in Martin County; Williamston is approximately 30 miles from Greenville (R. 165).

<sup>10</sup> General Statutes of North Carolina, c. 15, Art. 6, §15-46: "Every person arrested without warrant shall be either immediately taken before some magistrate having jurisdiction to issue a warrant in the case, or else committed to the county prison, and, as soon as may be, taken before such magistrate, who, on proper proof, shall issue a warrant and thereupon proceed to act as may be required by law."

<sup>11</sup> Bennie testified: "I heard that some men said that wherever they seen us at they were going to kill us. I told Mama and Daddy and they said 'You better leave tonight they might come and kill you and all of us' and I went to a colored man's house and late that night the officers came and got me." (S. Tr. 503).



R. 148, 159). His arrest too was made without a warrant (R. 152-3, 168). He was handcuffed (R. 148), and taken from one car to a second car (R. 149, 159). In the second car, according to the testimony of the officers, Bennie, with little or no prompting, also voluntarily confessed to the murder of O'Neal (S. Tr. 216, 219, 258, 271, 366, 383-384; R. 159-160, 240-1, 244-5, 250). Bennie testified, however, that he made no self-incriminating statement at that time (S. Tr. 230, 235) and the absence of any signed written statement obtained from him in the car supports his testimony. As in the case of Lloyd, Bennie, too, was taken to the distant jail in Williamston out of Pitt County without being told where he was being taken; he was not told of his right to stand mute and was not told of his right to the advice to friends and counsel guaranteed to him under the laws of North Carolina (R. 171).<sup>12</sup> And also, as in the case of Lloyd, even after his alleged oral confession Bennie was not brought before a magistrate or other hearing officer after his arrest (R. 167). Instead, he was put in a jail cell in a county out of Pitt County and without any notification to his friends or family.

When asked for an explanation for his arrest of petitioners without warrants and their subsequent detention without arraignment, Sheriff Tyson testified:

<sup>12</sup> On cross-examination Tyson testified:

"Q. Had you permitted Bennie Daniels to see his family? A. He hadn't asked to see them.

Q. He hadn't seen any lawyer at that time? A. Not as I know of. I left him in Williamston Tuesday morning and didn't see him until Tuesday night.

Q. By the Court: Did he make any request to see anybody? A. He did not.

Q. Did Bennie's people know that he was taken to Williamston? A. They didn't know it as I know of. They knew that I had arrested him. I told his daddy we had arrested him.

Q. Did they know where he was? A. Not as I know of.

Q. Did you tell him? A. No." (S. Tr. 218; see also R. 169).

“Q. Will you tell us why you didn't have Lloyd Ray arraigned promptly upon arriving in Williamston?

A. I couldn't have him arraigned until Court convened.

Q. Are you familiar with Section 15-46 of the General Statute of North Carolina, as follows: ‘Every person arrested without warrant shall be either immediately taken before some magistrate having jurisdiction to issue a warrant in the case, or else committed to the county prison, and, as soon as may be, taken before such magistrate, who, on proper proof, shall issue a warrant and thereon proceed to act as may be required by law’?

A. Yes, sir, I have read that.

Q. Did you take Lloyd Ray before a magistrate on Sunday morning when you arrested him? A. No.

Q. Tell us why you didn't? A. That is not the usual custom when you arrest a man charged with murder.

Q. Is it the usual custom to detain them illegally?

Objection by Respondent overruled.

I ask you if it is the usual custom in your county when you arrest someone for a felony not to bring them before a magistrate? A. No, I don't say that. We usually get a warrant for them as quickly as we can.

Q. You didn't do it in this case? A. He was arrested around one-thirty and we were still continuing investigation and looking for the other party.

Q. You mean you didn't have the time to take him before a magistrate? A. I wouldn't say I didn't have time but I felt like it was up to me and very important to arrest the other party as soon as we could.

Q. When did you arrest Bennie? A. Bennie was arrested on Tuesday morning around five o'clock.

Q. And when did you have him in Williamston? A. Immediately after he was arrested.

Q. Did you take him before a magistrate at that time? A. No, sir.” (R. 166-7).

Sometime in the late afternoon of February 8th, Lloyd was brought down to the office of Sheriff Roebuck and Bennie <sup>12a</sup> was brought into a separate room in that office (S. Tr. 266, 299; R. 161, 179, 245). They were questioned separately for a period of at least an hour or an hour and a half (S. Tr. 251, 261, 266, 299; R. 140-1, 179) with at least six or seven white men present (S. Tr. 212, 243, 251, 374, 393; R. 179, 256). The police officers testified that at the end of that time, and sometime between 6:00 and 7:00 P.M. on February 8th (S. Tr. 212), full confessions had been obtained from each of the petitioners, that the two were confronted with each other at that time and each of the confessions read to both of them, that the confessions were acknowledged by the petitioners to be true statements, and that Lloyd then made his mark on his statement and Bennie signed his (S. Tr. 214, 217, 244-246, 252-253, 254, 266, 271-272, 306, 393, 410-411; R. 162, 174-5, 237, 245, 249, 253-4). The petitioners testified to the contrary. They denied ever acknowledging that they had committed the murder of O'Neal and they denied ever signing or making their mark on the alleged confessions (S. Tr. 261-264, 230-233, 453).<sup>13</sup>

<sup>12a</sup> Bennie testified that he had been questioned, threatened and beaten in his cell before being brought down to the office (S. Tr. 230-235, 508-509; R. 150-1).

<sup>13</sup> The language employed in the alleged confessions (Ex. 8, 9, S. Tr. 273-278; R. 273-6) is language alien to the vocabulary (see, e.g., S. Tr. 493), the grammatical faculties and the mentality (see R. 154-5) of these two illiterates who, prior to the trial, had been committed to a state institution for examination to determine their mental competency. It is furthermore noteworthy that each alleged final confession consisted of an introductory statement on the first page, admittedly not in the language of the alleged confessor, and on the rest of that first page the body of the confession; the first page of each of the confessions was unsigned; in each confession there appeared on the second page thereof a concluding paragraph also admittedly not in the language of either of the petitioners and it was the second page alone which was allegedly signed by petitioners; in each case there appeared to have been room on the front page for the concluding paragraph and the signature of petitioner (R. 170-4, 179).

It is undisputed, however, that prior to the alleged confessions neither Lloyd nor Bennie had had the benefit of advice of or contact with friends, family, or counsel (S. Tr. 212, 248, 323; R. 171); nor is it disputed that 10 to 15 minutes after the confessions were allegedly signed, the petitioners were taken from the jail in Williamston to Raleigh, 125 miles from Williamston and almost 100 miles from Greenville. (R. 168). Again Tyson testified that this more distant removal of petitioners was required by considerations of safety. (R. 168-9). For over two months after their arrest petitioners did not see their families (R. 142-3).

Although the petitioners denied the signed confessions which were admitted in evidence, they may, nevertheless, challenge the alleged confessions on the grounds that such confessions were extorted and involuntary. *Lee v. Mississippi*, 332 U. S. 742; *White v. Texas*, 310 U. S. 530, 531, 532. For so long as a coerced confession has been admitted in evidence, the denial of the existence of a confession "can hardly legalize a procedure which conflicts with the accepted principles of due process". *Lee v. Mississippi, supra*, at 745. Similarly, if the alleged signed confessions were coerced, their admission into evidence may be challenged and was error irrespective of the voluntariness of any earlier or subsequent alleged oral confessions. *Stroble v. California*, 20 U.S. Law Week 4244, 4246.

At least since *Brown v. Mississippi*, 297 U.S. 278, it has been the undeviating practice of this Court to review and reverse convictions after trials at which there was admitted in evidence confessions induced by physical or mental coercion. *Chambers v. Florida*, 309 U.S. 227; *Canty v. Alabama*, 309 U.S. 629; *White v. Texas*, 309 U.S. 631; *id.*, 310 U. S. 530; *Lomax v. Texas*, 313 U.S. 544; *Vernon v. Alabama*, 313 U.S. 547; *Ward v. Texas*, 316 U.S. 547; *Ashcraft v. Tennessee*, 322 U.S. 143; *id.*, 327 U.S. 274; *Malinski v.*



*New York*, 324 U.S. 401; *Haley v. Ohio*, 332 U.S. 596; *Lee v. Mississippi*, 332 U.S. 742; *Watts v. Indiana*, 338 U.S. 49; *Turner v. Pennsylvania*, 338 U.S. 62; *Harris v. South Carolina*, 338 U.S. 68. It is particularly appropriate for this Court to review the facts herein to determine independently whether they spell out coercion in view of the instruction to the jury which made the trial judge the exclusive trier of the fact whether the confessions of Bennie and Lloyd were voluntary.

*Ward v. Texas*, 316 U.S. 547, provides the point of departure for evaluating the undisputed and uncontradicted evidence here. BYRNES, J., in that case stated the applicable criteria:

"This Court has set aside convictions based upon confessions extorted from ignorant persons who have been subjected to persistent and protracted questioning, or who have been threatened with mob violence, or who have been unlawfully held incommunicado without advice of friends or counsel, or who have been taken at night to lonely and isolated places for questioning. Any one of these grounds would be sufficient cause for reversal." (316 U.S., at 555)

The petitioners are Negroes of a southern community.<sup>14</sup> Each was 17 years of age when he was arrested (R. 100A, 100B). Each is one of ten children (R. 132, 145). Lloyd has never had any schooling in his life, his only occupation has been that of farming, and he could neither read nor write (S. Tr. 446, 229; R. 133). Bennie has had two years of schooling but cannot read or write except to write his own name (S. Tr. 498; R. 145). He, too, had never engaged in any occupation more sophisticated than that of farming. The crime for which they were arrested was

<sup>14</sup> The residents of Greenville have been described as follows: "White inhabitants are chiefly descendants of early English settlers, and most of the Negroes . . . are descended from the slaves on the cotton and tobacco plantations." Federal Works Administration, North Carolina (1939) 511.

the murder of a white man and that murder was committed in an extraordinarily brutal fashion. O'Neal had been stabbed, cut and bludgeoned to death, so that his features were practically beyond recognition. Such a crime is well calculated to inflame the passions of a community. The petitioners were warned, before their arrest, that the murder had been committed and that they were being sought for that murder. It was reported to them that "this man was killed out in the country and they said wherever they found you that's where they are going to leave you" (S. Tr. 504; see also S. Tr. 449, 503). The sheriff of the county so appraised the imminence of mob violence that immediately upon the arrest of petitioners he took them to a jail 30 miles from the county of the crime, their home, and their families; and several days after the crime, following petitioners' alleged confessions, the sheriff moved them to a still more distant refuge for their "safety" (R. 168-9).

Each of the petitioners was arrested in the middle of the night by numerous white, armed police officers. Each was then handcuffed, walked a considerable distance in the dark, and then driven for another more considerable distance in the dark. In the instance of Lloyd, the ride also included a delay of about 30 minutes on a desolate road. Both were driven to a jail in a different county and community from their own without notice thereof to friends or family. In neither instance did the police obtain a warrant of arrest and in both instances the petitioners were illegally detained without being arraigned and without a hearing until some time after their alleged confessions were reduced to writing. In the case of Lloyd, he was thus unlawfully detained for about 42 hours before his final alleged confession was reduced to writing; Bennie was thus held without a hearing for about 14 hours. Their alleged confessions were made without their having had the benefit of the advice of friends, relatives or counsel and without being informed of their

right to such assistance; and those confessions came at the end of persistent questioning in the presence of six or seven white police officers and a stenographer who was there present waiting to prepare their written confessions. Ten or fifteen minutes after the confessions were allegedly signed, the petitioners were taken to the jail house in another county, still more distant from their homes, friends and families.

Cumulatively, if not separately, the foregoing undisputed facts in this case necessitate the conclusion that there are here the inherently coercive circumstances which, under the decisions of this Court, render any resulting confession invalid and inadmissible. The youthful age of the petitioners (*Chambers v. Florida, supra; Haley v. Ohio, supra*); their illiteracy (*Harris v. South Carolina, supra; White v. Texas, supra*); the brutality of the crime and the threats of mob violence (*Chambers v. Florida, supra; Ward v. Texas, supra*); the circumstances of their arrest and being taken to a jail in a different county (*Ward v. Texas, supra*); their illegal arrest and detention without hearing or arraignment (*Harris v. South Carolina, supra; Turner v. Pennsylvania, supra; Watts v. Indiana, supra; Haley v. Ohio, supra*) and without any communication with family, friends or counsel (*Harris v. South Carolina, supra; Ashcraft v. Tennessee, supra; White v. Texas, supra; Chambers v. Florida, supra*); and the harrowing questioning which led up to the alleged confessions all combine to make those documents tainted and constitutionally inadmissible.

### C

**The Instructions to the jury of the trial judge concerning the alleged confessions effectively deprived petitioners of trial by jury.**

At the conclusion of the trial, the trial judge gave the jury an instruction of unusual length, prolixity and complexity.

In the course of that instruction he charged the jury as follows:

“Ladies and Gentlemen of the Jury: With respect to the statements referred to in the alleged confessions there has been some argument about whether or not they were made freely and voluntarily. I instruct you that the circumstances and conditions under which the statements made were investigated by the Court under preliminary examination of the Court as to whether they were made freely and voluntarily and are competent to be admitted in evidence but you are the sole judges of the weight to be given them and the credit to be given them.”

“And, with respect to whether the statements were made freely and voluntarily under the law it is the province of the Court to determine that, in order to determine whether or not they are admissible as evidence. The Court has decided that they were admissible as evidence because they were made without coercion or inducement, freely and voluntarily. But, you are not to infer from that that the Court has any intimation or wishes to be giving any intimation as to the weight you will give that evidence. That is solely a matter for you.” (S. Tr. 642, 680; R. 16-17).

The aforesaid instruction plainly informed the jury that it was not to consider whether the alleged confessions which alone could sustain the State's case, were made freely and voluntarily. The jury was permitted to pass upon the weight to be assigned to those alleged confessions but that function was illusory at best for if the jury was obliged to accept the confessions as having been made freely and voluntarily it could hardly fail to give these confessions conclusive weight. It is difficult to conceive of any evidence more damaging and more conclusive than a confession made freely and voluntarily.

The question whether the alleged confessions were made



freely and voluntarily was a disputed material issue of fact upon the trial. It was, of course, a proper function of the trial judge to pass upon that question for the purpose of determining the admissibility of the alleged confessions. But the trial judge went further and took that question of voluntariness from the consideration of the jury entirely as that question related to the innocence or guilt of the petitioners, and, in effect, directed the verdict of the jury on a material issue of fact in a criminal case.

Petitioners contend that the right to trial by jury in a capital cause is the kind of fundamental and basic right which is guaranteed under the Due Process Clause of the Fourteenth Amendment to the United States Constitution as essential to "a fair and enlightened system of justice" (*Palko v. Connecticut*, 302 U. S. 319, 325); and as an instruction which takes from a jury a material and disputed issue of fact is in violation of such a fundamental right to trial by jury (*Christoffel v. United States*, 338 U. S. 84; *Kanda v. United States*, 166 F. 91, 93 (C.A. 7), the action of the trial judge was "such as to deprive the petitioners of a trial according to the accepted course of legal proceedings" (*Buchalter v. New York*, 319 U.S. 427, 431) in violation of the Due Process Clause of the Fourteenth Amendment. In *Lyons v. Oklahoma*, 322 U.S. 596, 601, this Court indicated that due process under the Fourteenth Amendment requires that the "instruction fairly raises the question of whether or not the challenged confession was voluntary."<sup>15</sup> Under

<sup>15</sup> A comprehensive note which appears at 170 ALR 567 indicates that 28 jurisdictions expressly require that the question of voluntariness be left to the jury, 8 jurisdictions have a doubtful rule on the subject, and 12 jurisdictions permit the trial judge to pass finally upon the question of voluntariness of confessions. This Court has frequently noted with approval the practice of state courts to leave to juries the issue whether a confession was, in fact, voluntary (*Harris v. South Carolina*, 338 U.S. 68, 70; *Haley v. Ohio*, 332 U.S. 596, 599; *Malinski v. New York*, 324 U.S. 401, 404; *Lyons v. Oklahoma*, 322 U.S. 596, 600, 601; *Ashcraft v. Tennessee*, 322 U.S. 143,

the test of due process as thus stated, the instruction of the trial judge constituted fundamental constitutional error.

### D.

**Petitioners were unreasonably deprived of their right to appeal to the North Carolina Supreme Court.**

The factual circumstances surrounding the dismissal of petitioners' appeal by the North Carolina Supreme Court, have already been preliminarily set forth at pages 5-6 *supra*.

More particularly, the record shows (R. 72-5) that on June 6, 1949 the judgment of death by asphyxiation was rendered against the petitioners on a verdict of guilty of first degree murder. Thereupon petitioners noted an appeal to the Supreme Court of North Carolina and were allowed 60 days in which to make out and serve a statement of the case on appeal upon the Solicitor for the Fifth Judicial District of the State of North Carolina. Approximately one month passed before counsel for petitioners received the first volume of the record of the criminal trial, which first volume consisted of approximately 300 pages; and counsel for petitioners did not receive the full and complete record in the criminal cause from the court stenographer until approximately 50 or 51 days after June 6.

Despite the delay in the receipt of the record in the criminal cause, counsel for petitioners made all diligent efforts to prepare the statement of the case on appeal within the time prescribed so that although the last volume of the record was received about only one week prior to the expiration of the time for service of the statement of the case,

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145; *Lisbena v. California*, 314 U.S. 219, 234, 238; *Chambers v. Florida*, 309 U.S. 227, 228; *White v. Texas*, 309 U.S. 631), but petitioners have not found any opinion by the Court affirming a conviction wherein the issue of voluntariness was wholly taken from the jury.

on appeal, counsel for petitioners, by diligent and painstaking efforts, completed the preparation of said statement on the afternoon of Thursday, August 4, which was one day before the deadline.

On Friday, April 5, the last day on which service of the statement of the case on appeal could be made, Herman L. Taylor, Esq., one of the attorneys for petitioners, telephoned the office of the Honorable William J. Bundy, Solicitor, in Greenville, North Carolina, from Fayetteville, North Carolina, where Mr. Taylor was engaged in another matter, and by that telephone conversation Mr. Taylor attempted to communicate with Mr. Bundy for the purpose of serving the case on appeal. Mr. Taylor was informed by the telephone operator that the Solicitor was not in his office and Mr. Taylor thereupon spoke to Mrs. M. W. Fields, the Solicitor's secretary, and she informed Mr. Taylor that the Solicitor was not in his office or at his home and that he was out of town and could not be reached until Monday morning, August 8, when he would return to his office. Unable to contact the Solicitor in person, Mr. Taylor, on Saturday morning, August 6, 1949, left a copy of the statement of the case on appeal at the office of the Solicitor with the latter's secretary, and Mr. Taylor received in return a signed statement of acceptance of the statement by the said Mrs. M. W. Fields, on behalf of the Solicitor.

45 days thereafter the Solicitor served and filed 132 exceptions to the case on appeal, thereby indicating that he was in no wise prejudiced or injured by the one-day delay in the service of the case on appeal. Nevertheless the Supreme Court of the State of North Carolina, on the basis of the foregoing factual situation, dismissed on motion of the State and has refused and continues to refuse to entertain the appeal of the petitioners. For not only was the appeal not entertained and, ultimately, dismissed, but the

statutory substitute for appeal, the discretionary writ of certiorari (see Gen. Stat. North Carolina, c. 1, §1-269), was likewise denied by the North Carolina Supreme Court. Compare *McConnell v. Caldwell*, 51 N.C. 469, with *Zell Guamo Co. v. Hicks*, 120 N.C. 25, 26 S.E. 650; *People's Bank, etc. Co. v. Parks*, 191 N.C. 263, 131 S.E. 637.

It is petitioners' view that the foregoing facts fall within the interdiction of this Court "that a discriminatory denial of the statutory right of appeal is a violation of the equal protection clause of the Fourteenth Amendment". *Dowd v. United States ex rel. Cook*, 340 U.S. 206, 208; *Cochran v. Kansas*, 316 U.S. 255. An unreasonable abuse of discretionary judicial power to foreclose state appellate remedies is a plain, and, indeed, a more effective deprivation of access to those remedies than the prison regulations which impeded the submission of appeal documents in the cited cases. For the dismissal of the appeal here and the refusal to reinstate it by the discretionary writ of certiorari was an adjudication that petitioners could not process their appeal—an adjudication of damning finality under North Carolina law in view of the absence of any other applicable state corrective procedure. And it is here contended by respondent that the denial of the appeal by the North Carolina Supreme Court not only barred any further state corrective process but federal habeas corpus as well. However deference to local appeal practice may have inflexibly required prompt perfecting of the appeal for the purposes of the appeal, we submit that the denial of the discretionary writ of certiorari, if it had the drastic and conclusive consequences for which respondent contends, was, in the circumstances, the kind of "discriminatory denial" of the state's appellate remedies which this Court proscribes.



## Federal Habeas Corpus Is the Appropriate Remedy for the Kind of Violations of Federal Constitutional Rights Which Here Obtain

As late as 1950 it was said that "The Supreme Court has not specifically ruled on the question" whether a conviction could be attacked collaterally by federal habeas corpus on the ground that a coerced confession had been admitted in evidence. *Smith v. United States*, 187 F. 2d 192, 195 (App. D. C.), *cert. den.* 341 U.S. 927. No such doubt exists, of course, that petitioners may thus attack the judgment here under review if, as they contend, they were unreasonably deprived of their appellate remedies by the courts of North Carolina and thereby denied the equal protection of the laws. *Dowd v. United States ex rel. Cook*, 340 U.S. 206; *Cochran v. Kansas*, 316 U.S. 255. And, on the other hand, older cases decided by this Court have expressed the view that federal habeas corpus is not available to challenge a state conviction on the ground that the defendant has been denied the equal protection of the laws because members of his race were purposefully excluded from the jury which indicted and/or convicted him (*Andrews v. Swarz*, 156 U.S. 272; *De re Wood*, 140 U.S. 278; see also *Kaizo v. Henry*, 211 U.S. 146), although such a circumstance was one of the factors which led to the allowance of the writ by the Court in *Moore v. Dempsey*, 261 U. S. 86. The decisions of the Court defining the applicable area of federal habeas corpus jurisdiction become clarified and unified only upon examination of the history of such jurisdiction with regard for the nature and scope of the jurisdiction of this Court to review the judgments of state courts.

The writ of habeas corpus, the origins of which the

scholars find obscure,<sup>16</sup> was part of the English common law judicial machinery received by this country. *McNally v. Hill*, 293 U.S. 131, 136; Moore, *op. cit. supra* at 417-419. At the time of its reception its function, with respect to testing the propriety of official detention, was limited largely to a review of the record for the purpose of ascertaining whether "the prisoner was held under final process based upon a judgment or decree of a court of competent jurisdiction" (*Frank v. Mangum*, 237 U.S. 309, 330). Federal habeas corpus to review the detention of persons in state custody was even more limited—"no writ of *habeas corpus*, except *ad testificandum*, could be issued in the case of a prisoner in jail under commitment by a court or magistrate of a State" (*Whitten v. Tomlinson*, 160 U.S. 231, 239). By statute this federal habeas corpus jurisdiction over state action was slightly enlarged prior to 1867. Act of March 2, 1833, 4 Stat. 634, c. 57, § 7; Act of August 29, 1842, 5 Stat. 539, c. 257. Then in 1867, as a consequence of the Civil War, the predecessor to the present legislation circumscribing federal habeas corpus jurisdiction was adopted. Act of February 5, 1867, 14 Stat. 385, c. 28, § 1; Rev. Stat. §§ 751-766, 28 U.S.C.A. (1940) §§ 452-461; 28 U.S.C.A. (1948) §§ 2241-55. Federal courts were thereby authorized to grant the writ in the instance of a prisoner in state custody "in violation of the Constitution or of a law or treaty of the United States".

Notwithstanding the expansive federal jurisdiction granted and intended in the Act of 1867, this Court continued for some time to deem that jurisdiction limited to a test of jurisdiction over the subject matter. See, *e. g.*,

<sup>16</sup> Longsdorf, "Habeas Corpus: A Protean Writ and Remedy", 8 FRD 179; Dobie, "Habeas Corpus in the Federal Courts", 13 Virginia Law Rev. 433; Note, "The Freedom Writ—The Expanding Use of Habeas Corpus", 61 Harvard Law Rev. 657; Moore's Commentary on the United States Judicial Code (1949) 417.

*Goto v. Lane*, 265 U.S. 393, 402; *Felts v. Murphy*, 201 U.S. 123; *Valentina v. Mercer*, 201 U.S. 131; *Bergemann v. Backer*, 157 U.S. 655; *Crossley v. California*, 168 U.S. 640; *Kohl v. Lehlback*, 160 U.S. 293. On occasion, however, even in the earlier cases, "jurisdictional" requirements were equated with constitutional mandates and prohibitions for purposes of federal habeas corpus, so that in *In re Nielsen*, 131 U.S. 176, 185, the Court described habeas corpus jurisdiction by reference to the "express provision of the Constitution, which bounds and limits all jurisdiction". See also *Rogers v. Peck*, 199 U.S. 423, 434; *Ex parte Siebold*, 100 U.S. 371, 376, 377; *Ex parte Yarbrough*, 110 U.S. 651, 654; *Ex parte Wilson*, 114 U.S. 417, 422. And on other occasions the writ was allowed upon a showing of a violation of rights more properly deriving from the Constitution than from any jurisdictional excess. *Minnesota v. Barber*, 136 U.S. 313; *Ex parte Siebold*, *supra*; *In re Nielsen*, *supra*; *In re Snow*, 120 U.S. 274; *Ex parte Bain*, 121 U.S. 1; *Ex parte Green*, 114 F. 959 (C.C. Ky.) But so long as there remained review as a matter of right of state court convictions by writ of error to the United States Supreme Court—a writ which existed almost from the beginning of the Republic [Judiciary Act of September 24, 1789, § 20, § 25, 1 Stat. 85]—the pressure for an extended federal habeas corpus jurisdiction was not great and that pressure was subordinated to the considerations of comity and deference owing to the state courts which dictated that, as a matter of discretion, only the highest court in the federal judicial system should exercise the power to reverse the action of a state court (*Ex parte Royall*, 117 U.S. 241). It was in this context that the decisions of the Court in cases such as *Andrews v. Swartz*, *supra*, and *In re Wood*, *supra*, were rendered.

With the transition from review as a matter of right to

review as a matter of discretion effected by the Judiciary Acts of 1916 (39 Stat. 726) and 1925 (43 Stat. 936), it became inevitable that the pressure for expanding federal habeas corpus review of federal convictions would become more exigent. If the old channel of federal review became clogged till it allowed but a trickle, other routes had to be found and were found to accommodate the surge of persons detained under state convictions asserting violation of federal constitutional rights. And that surge became even more urgent as the rights guaranteed under the Fourteenth Amendment to the United States Constitution received the expansive definition of the last twenty years. *Darr v. Burford*, 339 U. S. 200, 221 (FRANKFURTER, J. dissenting). The revision of the doctrine of the scope of federal habeas corpus jurisdiction reflected these pressures and the resultant accommodations. The test shifted perceptively from a review of "jurisdiction" to an inquiry whether fundamental constitutional rights had been abridged—from the gloss on the Act of 1867 dictated and allowed by expediency to the express language of the Act:

"*Habeas corpus* is presently available for use by a district court within its recognized jurisdiction whenever necessary to prevent an unjust and illegal deprivation of human liberty. *Wade v. Mayo*, 334 U. S. 672, 681.

"... the federal courts will entertain habeas corpus to redress the violation of [a] federal constitutional right". *Hawk v. Olson*, 326 U. S. 271, 276.

"[the writ is available when] the petitioner has exhausted his state remedies and, . . . he makes a substantial showing of a denial of federal right". *Ex parte Hawk*, 321 U. S. 114, 118.

"... the use of the writ in the federal courts to test the constitutional validity of a conviction for crime is not restricted to those cases where the judgment of conviction is void for want of jurisdiction of the trial



court to render it. It extends also to those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused . . . ." *Waley v. Johnston*, 316 U. S. 101, 104-105.

" . . . if it be found that the court had no jurisdiction to try the petitioner, or that in its proceedings his constitutional rights have been denied, the remedy of *habeas corpus* is available". *Bowen v. Johnston*, 306 U. S. 19, 24.

"There is preserved in full [by the new § 2241 of Title 28] the right of persons imprisoned under judgments of state and federal courts to ask release on the grounds that they have been denied the sort of trial guaranteed by the Constitution". Parker, "Limiting the Abuse of Habeas Corpus", 8 FRD 171, 178.<sup>17</sup>

That the admission into evidence of coerced confessions comes within the category of fundamental constitutional rights thus safeguarded by federal habeas corpus was settled by the Court just the other day in *Jennings v. Illinois*, 342 U. S. 104. There petitioners for federal habeas corpus complained that their convictions in the courts of the State of Illinois were the result of involuntary confessions. In writing for the Court, Vinson, C. J., declared:

"If their allegations are true and if their claims have not been waived at or after trial, petitioners are held in custody in violation of federal constitutional rights. Petitioners are entitled to their day in court for the resolution of these issues. Where the state does not afford a remedy, a state prisoner may apply for a writ of habeas corpus in the United States District Court to

<sup>17</sup> Various commentators have observed the foregoing shift from the so-called "jurisdictional" test to the so-called "fundamental constitutional rights" test. Note, 61 *Harvard Law Rev.* 657, 661; Moore, *op. cit. supra* at 419-422; Peters, "Collateral Attack By Habeas Corpus upon Federal Judgments in Criminal Courts", 23 *Wash. Law Rev.* 87, 89; McGraw & Stewart, "Limitations on Habeas Corpus in the Federal District Courts", 26 *Notre Dame Lawyer* 487, 488.

secure protection of his federal rights." (342 U. S., at 110, 111).

This determination in *Jennings v. Illinois* was foreshadowed by many earlier decisions of the Court. In *Mooney v. Holohan*, 294 U. S. 103, it was held that federal habeas corpus jurisdiction extended to state prosecutions wherein perjured testimony was knowingly employed by the prosecution in order to obtain a conviction. That proposition is now so well settled that it is no longer open to controversy. *Pyle v. Kansas*, 317 U. S. 213; *Hawk v. Olson*, 326 U. S. 271, 275. If the writ will issue for the use of coerced or perjured testimony of one other than the accused, it follows that the writ should issue to remedy the use of coerced and perjured testimony of the accused. See *Hysler v. Florida*, 315 U. S. 411, 413; *Lisenba v. California*, 314 U. S. 219, 237; see also Peters, *op. cit. supra* at 99-100; Moore, *op. cit. supra* at 421, n. 19. Similarly, a plea of guilty induced by intimidation is properly the subject of attack by habeas corpus (*Waley v. Johnston*, 316 U. S. 101; *Von Moltke v. Gillies*, 332 U. S. 708); the analogous vulnerability of a coerced confession was explicitly stated in *Waley v. Johnston*, *supra*, at 104:

"For a conviction on a plea of guilty coerced by a federal law enforcement officer is no more consistent with due process than a conviction supported by a coerced confession".

Moreover, the Court has in numerous instances, albeit not habeas corpus proceedings, expressed in the strongest language its conviction that the infliction of punishment upon the basis of an involuntary confession is violative of those elementary notions of justice and fair play which, as has been seen, are sufficient to invoke relief by habeas corpus. In *Haley v. Ohio*, 332 U. S. 596, 607, the introduction into evidence of a confession elicited by physical or mental

duress was characterized as violative of "fundamental notions of fairness and justice"; similarly such confessions were deemed in *Malinski, et al. v. New York*, 324 U. S. 401, 417, to run afoul of "those canons of decency and fairness which express the notions of justice of English-speaking peoples even towards those charged with the most heinous offenses". The Court has gone so far as to hold that a conviction resulting from the use of a coerced confession is "void" (*Lee v. Mississippi*, 332 U. S. 742, 745). And in the earliest and most authoritative case on the subject, the then Chief Justice HUGHES wrote of a conviction based upon an involuntary confession:

"The conviction and sentence were void for want of the essential elements of due process, and the proceeding thus vitiated could be challenged in any appropriate manner, *Mooney v. Holohan, supra*". *Brown v. Mississippi*, 297 U. S. 278, 287.

We think it therefore plain that the decision of the Court in *Jennings v. Illinois* makes explicit what has long been implicit in the decisions of the Court, i.e., that the admission into evidence of an involuntary confession is constitutional error of such a nature and magnitude as to warrant relief by any appropriate means, including habeas corpus.

A challenge to a judgment rendered by juries from which have been excluded competent and qualified persons solely for reasons of race or color is even more clearly the proper subject of inquiry upon federal habeas corpus. For the constitution of the grand and petit juries are matters which literally go to "jurisdiction". One commentator has therefore concluded with respect to the right to challenge juries from which Negroes have been excluded:

"If the defendant did not waive his right by failing to assert it at his trial, then it would always be available to him, even by a later application for a writ of habeas corpus". Peters, *op. cit. supra*, at 93.

This conclusion is warranted by the decisions of the Court which hold that the denial to a Negro defendant "of his right to a selection of grand and petit jurors without discrimination against his race, because of their race, would be a violation of the Constitution and the laws of the United States" (*Neal v. Delaware*, 103 U. S. 370, 394; *Ex parte Virginia*, 100 U. S. 313, 322, 323; *Bush v. Kentucky*, 107 U. S. 110, 119; *Norris v. Alabama*, 294 U. S. 587, 589; *Hale v. Kentucky*, 303 U. S. 613, 616; *Pierre v. Louisiana*, 306 U. S. 354, 361; *Hill v. Texas*, 316 U. S. 400, 406). Nor has the Court failed to make manifest its understanding that racial discrimination in the selection of jurors is a constitutional infirmity of the basic and fundamental kind required as a predicate for habeas corpus relief:<sup>18</sup>

"For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government". *Smith v. Texas*, 311 U. S. 128, 130.

And in *Hill v. Texas*, 316 U. S. 400, 406, the then Chief Justice STONE wrote for a unanimous Court:

"... no state is at liberty to impose upon one charged with crime a discrimination in its trial procedure which the Constitution, and an Act of Congress

<sup>18</sup> The requirement that the error committed in a state trial be of a "fundamental" type abhorrent to elementary notions of justice is one which obtains with respect to determining which errors come within the scope of the Due Process Clause of the Fourteenth Amendment. Racial discrimination in the selection of jurors is of such a fundamental type but it is in addition a violation of the specific prohibition against the denial of the equal protection of the laws, which latter prohibition is by itself a basis for habeas corpus jurisdiction. *Cochran v. Kansas*, 316 U.S. 255; *Dowd v. United States ex rel Cook*, 340 U.S. 206. Accordingly, the practice of racial exclusion in the selection of jurors may entitle the defendant prejudiced thereby to habeas corpus relief irrespective of whether such a practice violates a "fundamental" constitutional right.



passed pursuant to the Constitution, alike forbid. Nor is this Court at liberty to grant or withhold the benefits of equal protection, which the Constitution commands for all, merely as we may deem the defendant innocent or guilty. *Tumey v. Ohio*, 273 U. S. 510, 535. It is the State's function, not ours, to assess the evidence against a defendant. But it is our duty as well as the State's to see to it that throughout the procedure for bringing him to justice he shall enjoy the protection which the Constitution guarantees. Where, as in this case, timely objection has laid bare a discrimination in the selection of grand jurors, the conviction cannot stand, because the Constitution prohibits the procedure by which it was obtained."

Accordingly, various lower federal courts have assumed that, if properly raised and preserved, error in the exclusion of Negroes from juries in a state prosecution would be a matter for review in the federal courts by habeas corpus. *Johnson v. Wilson*, 131 F. 2d 1 (C. A. 5); *United States ex rel Jackson v. Brady*, 133 F. 2d 476 (C. A. 4), *cert. den.* 319 U. S. 746; *Carroll v. Reed*, 102 F. 2d 933 (C. A. 8), *cert. den.* 307 U. S. 643; *Johnson v. Sanford*, 167 F. 2d 738 (C. A. 5). One lower federal court addressed itself exactly and precisely to the effect that the change in the nature of this Court's jurisdiction after the Judiciary Act of 1925 had upon the right of a defendant in a state prosecution to challenge in federal habeas corpus the exclusion of Negroes from the trial jury:

"Counsel for Crawford [petitioner] contend that these cases are not applicable for, if he were remitted to Virginia and seasonably and properly raised the question here under consideration and the question was decided against him, at the present time and under the Judiciary Act of 1925, he could not, as of right, prosecute a writ of error from the Supreme Court of the United States to the highest court of the state of Virginia to which the case could be taken. It is true that

his right of review by writ of error from the Supreme Court of the United States on the facts of this case was taken away by the act of 1925, for under the law as it now stands no writ of error lies from the Supreme Court in this case, as the grand jury was not drawn under a statute of the state of Virginia which violated the Constitution of the United States. 43 Stat. 936, 937, c. 229, § 237 (28 U. S. C. A. § 344). He is, however, permitted by that act to apply to that court for certiorari, a discretionary writ. *South Carolina v. Bailey*, supra. If review on such application is not granted he undoubtedly, at that state of the proceedings, could have the matter reviewed on habeas corpus in the proper federal court, being without review in the Supreme Court on writ of error as of right. In *Royall*, 117 U. S. 241, 252, 253; In *re Wood*, supra, 140 U. S. at pages 289, 290. It would not then be an endeavor by habeas corpus to intervene before trial or to review what ordinarily can be re-examined only on writ of error; and the federal court applied to could not, under such circumstances, properly refuse review on habeas corpus." *Hale v. Crawford*, 65 F. 2d 739, 749 (C. A. 1).

The relationship between a fair trial and a jury selected without regard to the race or color of its members is exemplified by the instant case. Petitioners are Negroes who were on trial for the devastating murder of a white man. The crime was broadcast through the community and inflamed sentiment to a dangerous pitch. The quality and orientation of that sentiment and the practice of exclusion of Negroes from juries derived from a common source. The community which will foreclose the Negro from exercising his rights and prerogatives as a citizen to sit as a juror will exercise less than calm, dispassionate and fair judgment of a Negro charged with the wanton, clandestine killing of a white man. Judgment by such a jury, the selection of which caters to and reflects racial discrimination against Negroes, would be a judgment predicated upon factors unrelated to the inno-

cence or guilt of the accused; a jury which mirrors the community pattern of racial discrimination would be incapable of fair and unbiased judgment. However scrupulous the observance of the regular forms of the trial process, the trial could not be the fair trial of the issue of the innocence or guilt of the accused which is inherent in our notion of elementary justice. In the circumstances we think the error of excluding Negroes from the juries which indicted and/or convicted petitioners was the kind of error which warrants relief by habeas corpus.

And, finally, the contention by petitioners that they were deprived of their right to trial by jury in a capital case as a result of the instruction by the trial judge to the jury, is yet another proper subject for federal habeas corpus in view of the plethora of authorities heretofore cited and discussed by petitioners for the proposition that federal habeas corpus is available where a defendant in a criminal case is deprived of a fair trial, an essential of which petitioners deem to be a trial by jury. *Lyons v. Oklahoma*, 322 U. S. 596, 601. In this connection we note that the trial judge's treatment of the confessions in his charge was not merely an erroneous instruction. It was far more. When the trial judge told the jury that the petitioners' alleged confessions were voluntary for all purposes he in effect directed a verdict of guilty and deprived petitioners of their right to a jury trial in a capital case. It is this fundamental right to a jury trial which petitioners seek to raise and, we respectfully submit, may raise in a federal habeas corpus proceeding.

The opinion of the Fourth Circuit suggests the view that, irrespective of the nature of the questions here raised, so long as those questions were the subject of or capable of fair review in the state courts they could not be reconsidered in the federal courts in a habeas corpus proceeding. In this view federal habeas corpus is confined to those cases

where either because of ignorance, fraud, duress, or lack of counsel, the petitioner could not at his trial or thereafter raise fundamental constitutional objections in the state courts, or to those cases where such basic, fundamental constitutional objections derive from matter *aliunde* the record—such as evidence obtained after a trial that the prosecution knowingly used perjured testimony—and the state provides no adequate remedy in such circumstances.<sup>18a</sup> The other, more usual situation, wherein the objections are raised at the state trial, there adjudicated, and thereafter reviewed, would, according to the Fourth Circuit, foreclose federal review no matter how gross the error and no matter how basic the right deprived; the alternative, according to the Fourth Circuit, would be to use the writ “in lieu of an appeal” (R. 327).

§2254, in terms, makes the exhaustion of state remedies a basis for not a bar to federal habeas corpus; the Fourth Circuit rule yields the opposite. For by that rule, once state remedies are exhausted—assuming their adequacy<sup>18b</sup>—federal habeas corpus is unavailable. This Court in *Ex parte Hawk*, 321 U. S. 114, 117, 118, squarely held that the “exhaustion” requirement is one distinct from and alternative to the requirement of “extraordinary circumstances”—and it is this latter requirement which comprehends the situation of inadequacy of remedies which the Fourth Circuit now treats as an indispensable, conjunctive condition for federal habeas corpus jurisdiction.

At bottom, the approach of the Fourth Circuit is in error

<sup>18a</sup> The Fourth Circuit's approach is fully set out in *Sanderlin v. Smyth*, 138 F. 2d 729, and seems also to be that followed by the Second Circuit (*United States ex rel Rheim v. Foster*, 175 F. 2d 772; *United States ex rel Steele v. Jackson*, 171 F. 2d 432, cert. den. 336 U. S. 939; *Schechtman v. Foster*, 172 F. 2d 339). The Court of Appeals for the District of Columbia appears to follow a similar view (*Kenion v. Gill*, 155 F. 2d 176; *Smith v. United States*, 187 F. 2d 192, cert. den. 341 U. S. 927).

<sup>18b</sup> Inadequacy of state remedies is a separate and alternative basis for federal habeas corpus review under §2254.



because it does not wholly defer to the above-described effect on federal habeas corpus jurisdiction worked by the change in the Judiciary Acts of 1916 and 1925 of this Court's jurisdiction over state-court judgments. There has always been in our federal system some federal forum for the review of federal questions raised by one in state custody. But the Fourth Circuit considers that federal function to be sufficiently performed, in the ordinary situation, by this Court through the medium of certiorari jurisdiction. Petitioners disagree. Whereas the conflicting interests of federal review of federal questions and respect for the state courts could be accommodated, when the Court's jurisdiction was invoked by writ of error, by stringently limiting such review in the lower federal courts and largely confining the power to review and reverse to this Court, no such accommodation is possible now when the Court's jurisdiction is by writ of certiorari and, therefore, discretionary. At best, those conflicting interests can now be accommodated by giving this Court the "first crack" at reviewing and reversing, as was required in *Darr v. Barford*, 339 U. S. 200, and, if the Court declines such "first crack", allowing the petitioner to obtain review by federal habeas corpus. Beyond that this Court's certiorari jurisdiction cannot be extended to provide the principal federal forum for the review of federal questions. For, admittedly, certiorari jurisdiction is exercised on factors and conditions which, in considerable measure, are unrelated to the merits of the cause under review. *Maryland v. Baltimore Radio Show*, 338 U. S. 912. If in passing on certiorari applications, the Court is thereby functioning—as it did on writs of error—as the first and last forum of federal review of important federal questions raised by persons held in state custody, as it would under the view of the Fourth Circuit in most such cases, then responsibility would dictate consideration of those applications upon bases and criteria char-

characteristic of writ of error jurisdiction—the very result it was intended to eliminate when, at the behest of the Court, the Acts of 1916 and 1925 were adopted.

In short, the certiorari jurisdiction of this Court was not intended to be and is not the sufficient federal forum for the review of fundamental federal questions raised by persons in state custody. That regard for the state courts which would seek, as far as possible, to authorize only this Court to reverse the action of the highest court of the state is now expressed and satisfied by the requirement of *Dorr v. Burford* that certiorari must be sought before the institution of a habeas corpus proceeding. At the same time, however, the regard owing to those who complain that they have been deprived of their liberty in violation of fundamental federal mandates and prohibitions entitles them, once this Court has declined to review and reverse the state action complained of, to obtain that federal review of such objections which has traditionally inhered in our federal system; and for the person in such circumstances federal habeas corpus is the necessary and appropriate remedy.

We have shown that the questions here raised are of the kind and magnitude which warrant federal intervention, even after due deference is accorded to the independence and sovereignty of the state judiciary. It remains only to be seen whether the manner in which petitioners have applied for and exhausted the remedies provided by the law of North Carolina was sufficient compliance with §2254 which prescribes the predicate to federal habeas corpus jurisdiction for persons in state custody.

### III

#### **No Procedural Grounds Exist for Foreclosing Petitioners From Federal Habeas Corpus**

It may be seen from the petition for the instant writ and from the return made thereon, that prior thereto, the pe-

tioners, in the following sequence, attempted to appeal the conviction to the Supreme Court of North Carolina, applied to that same Court for a writ of certiorari when the appeal was dismissed, applied to that same Court for a writ of error *coram nobis* when the writ of certiorari was denied, petitioned the Supreme Court of the United States for certiorari when the writ of error *coram nobis* was denied, and filed a second writ of error *coram nobis* with the Supreme Court of North Carolina when the writ of certiorari was denied by the United States Supreme Court<sup>19</sup> (R. 42-64). This habeas corpus proceeding was filed only after the second request for writ of error *coram nobis* was denied. Petitioners contend that the foregoing sequence of events exhausts petitioners' state remedies within the meaning of § 2254.

The decisions of the Supreme Court of North Carolina in this very case make it obvious that petitioners can no longer obtain a state remedy by way of appeal, certiorari or *coram nobis*.<sup>20</sup> The State of North Carolina does provide a procedure for the writ of habeas corpus. Gen. Stat. of North Carolina, c. 17. But respondent has never contended that said procedure is available to petitioners in this case, and the language of the statutory provisions as well as of the applicable decisions of North Carolina appear to foreclose application in North Carolina for habeas corpus. Section 17-4 of the General Statutes of North Carolina specifies:

"Application to prosecute the writ shall be denied in the following cases: . . .

<sup>19</sup> No petition for writ of certiorari was filed with this Court from the denial of the second writ of error *coram nobis*. But as that latter denial was clearly on non-federal, state procedural grounds, no petition for certiorari was required. *White v. Regen*, 324 U.S. 760, 765; *House v. Mayo*, 324 U.S. 42, 48.

<sup>20</sup> Nor can petitioners move for a new trial. See North Carolina, Gen. Stat. Ann. c. 15, § 15-174; c. 4, § 1-297.

2. Where persons are committed or detained by virtue of the final order, judgment or decree of a competent tribunal of civil or criminal jurisdiction, or by virtue of an execution issued upon such final order, judgment or decree."

It will be noted that the statute does not merely require that the writ be denied in the cited circumstances, but that the application to prosecute the writ shall be denied. Thus, if petitioners are within the prohibition contained in Section 17-4, they literally do not have "the right under the law of the State to raise . . . the question presented" (28 U.S.C.A. § 2254) by habeas corpus. And as petitioners do not dispute that the judgment of conviction was that of a "competent tribunal"—at least within the meaning of the North Carolina law—it is clear that habeas corpus is not an available state remedy in this case. This conclusion becomes unassailable in the light of the recent decision of the North Carolina Supreme Court in *In re Taylor*, 229 N.C. 207, 49 S. E. 2d 749, where it was held that habeas corpus was not available even where the petitioner complained of the admitted deprivation of the constitutional right to counsel. See also, *Ex parte Steele*, 220 N. C. 685, 18 S. E. 2d 132; *State v. Dunn*, 159 N.C. 470, 74 S. E. 1014; *In re Holley*, 154 N.C. 163, 69 S. E. 872. The type of habeas corpus remedy thus afforded by North Carolina need not be exhausted as a prerequisite to federal relief. *Potter v. Dowd*, 146 F. 2d 244 (C.A. 7); cf. *Marino v. Ragen*, 332 U.S. 561, 563, 564 (RUTLEDGE, J., concurring).

In 1951, after the institution of this proceeding, North Carolina adopted a new, comprehensive post-conviction corrective procedure. Session Laws of North Carolina, 1951, c. 1083; North Carolina Gen. Stat. Ann. (1951 Supp.), c. 15, Article 22, §§ 15-217-15-222; see *Quick v. Anderson*, 194 F. 2d 183 (C.A. 4). The relief there provided extends to "Any person imprisoned . . . who asserts that in the pro-



ceedings which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States or of the State of North Carolina, or both, as to which there has been no prior adjudication by any court of competent jurisdiction . . . " § 15-217; see, also § 15-218. Unfortunately, petitioners, having raised at their trial the questions here presented and having obtained from the trial court at least, an adjudication thereon, would appear to be without the scope of the newly-enacted corrective process. That process would be available only if petitioners had wholly failed to raise and preserve the errors they here complain of.

Notwithstanding the present total absence of any state remedy, the lower courts have denied relief: the District Court found herein that petitioners had received review and adjudication on the merits by the North Carolina Supreme Court and that that determination was conclusive (R. 89-91, 95); the Court of Appeals found that having failed to perfect the appeal on time, petitioners, in effect, forfeited their right to review on the merits by way of appeal and that habeas corpus could not be used in lieu of the appeal thus forfeited (R. 326-7, 331-2). We think that the North Carolina Supreme Court never reviewed the merits of the questions here raised.<sup>21</sup> But the result here is the same whether it did or not.

<sup>21</sup> Respondent's position always has been that petitioners were never entitled to a review on the merits by the North Carolina Supreme Court because they had not served the statement of the case on appeal in a timely fashion. Indeed, as has heretofore been indicated, before the United States Supreme Court the State of North Carolina represented that "The Supreme Court of North Carolina, has, however, not passed upon the constitutional issues now raised by the petitioners" (see p. 8, *supra*). Upon the hearing before the District Court it was apparent that that Court, at least at the time of the hearing, did not consider that the North Carolina Supreme Court had passed upon the federal questions here presented for the District Court allowed petitioners to introduce evidence attacking the judgment of the state court collaterally and, in fact, denied respondent's motion to dismiss the petition and overruled the motion of respondent to exclude and/or strike

If petitioners did obtain a review on the merits as part of the appeal, then there can be no question that petitioners have fulfilled the exhaustion requirements of § 2254. And if such review can be said to have been had by dint of petitioners alternative applications for relief by way of certiorari or writ of error *coram nobis*, then under that branch of *Wade v. Mayo*, 334 U. S. 672, which has not been disturbed by *Darr v. Burford*, 339 U. S. 200, again petitioners have exhausted their state remedies. *United States ex rel Morrison v. Foster*, 175 F. 2d 495 (C. A. 2); *Commonwealth of Pennsylvania ex rel Billman v. Burke*, 170 F. 2d 413 (C. A. 3); *United States ex rel. Marelia v. Burke*, 101 F. Supp. 615 (E. D. Pa.). The denial of certiorari by this Court following such review, while entitled to weight, is no conclusive or decisive bar to this proceeding. *Darr v. Burford*, *supra*; *Coggins v. O'Brien*, 188 F. 2d 130 (C. A. 1); *Goodman v. Lainson*, 182 F. 2d 814 (C. A. 8); *Anderson v. Eidson*, 191 F. 2d 989 (C. A. 8); see also pages 48-50 *supra*.

the evidence submitted by petitioners. The subsequent position of the District Court was based mainly on the observation by the North Carolina Supreme Court, when granting the motion of the Attorney General of North Carolina to docket the case and dismiss the appeal, that: "We have carefully examined the record filed in this case and find no error therein" (*State v. Daniels*, 231 N.C. 509, 57 S. E. 2d 653). It will be noted that this observation stands by itself and is unsupported by any opinion or discussion either of the facts or of the law pertaining to the jury and confessions questions raised upon the prosecution. Moreover, the foregoing observation was not based upon any briefs submitted by either of the parties on the merits nor was it rendered after oral argument—formal or otherwise—on the merits. Indeed, it is dubious whether there was available to the Supreme Court of North Carolina a transcript of the testimony of the criminal trial at the time it acted upon the motion to docket and dismiss the appeal. Quite clearly, under the foregoing circumstances, the North Carolina Supreme Court never inquired fully into the merits of the grave constitutional questions raised upon the prosecution. Cf. *Williams v. Kaiser*, 323 U.S. 471, 477; *House v. Mayo*, 324 U.S. 42. And the observation so heavily relied upon by the District Court can only be construed as referring to the judgment roll which was before the court at the time that it acted upon the State's motion to docket and dismiss the appeal. It was that judgment roll which, in all likelihood, constituted "the record" to which the North Carolina Supreme Court had reference in the foregoing opinion.

If, however, no review on the merits was evoked by petitioners in the North Carolina Supreme Court, and if, as respondent concedes, petitioners are without further state remedy, the question arises whether petitioners' delay of one day in perfecting their state appeals worked an irreparable and complete forfeiture of the right to complain of and obtain relief for the gross constitutional errors in the processes by which the State of North Carolina proposes to take the lives of the petitioners. We have found no case, at least in this Court, which sanctions such a disregard for the high humane purposes of the Great Writ.

Were this a federal prosecution, there would be ample explicit authority to repudiate any such forfeiture doctrine. Of course, the litigant who purposefully foregoes his right to appeal and elects to proceed by habeas corpus for reasons of some supposed procedural advantage will properly be confronted with the requirements of orderly judicial administration as a bar to the proceeding. *E.g.*, *Craig v. Hecht*, 263 U. S. 255; see also *In re Lincoln*, 202 U. S. 178, 182, 183. On the other hand, the litigant who did not appeal because he was not accorded his constitutional right to counsel, an agency frequently necessary to the prompt processing of an appeal, is for that reason accorded rather than denied habeas corpus relief (*e.g.*, *Johnson v. Zerbst*, 304 U. S. 1458; *Waley v. Johnston*, *supra*), as is the litigant who otherwise cannot, for good cause, effectively avail himself of his right to appeal (*Adams v. United States*, 317 U. S. 269, 274). But where the effect of a failure to appeal is not determined by whether it was due to a matter of deliberate choice or to circumstances which effectively deprived the litigant of a choice, then, in the review of federal convictions, the effect of such failure is determined by whether the petitioner raises the kind of questions appropriate for habeas corpus jurisdiction. For in the review of federal convictions, as in the review of state convictions,

habeas corpus jurisdiction depends on the commission of "jurisdictional and constitutional errors at the trial, without limit of time (*United States v. Smith*, 331 U. S. 469, 475); the "deprivation of . . . basic and fundamental procedural safeguards, . . . procedural irregularities of such a nature or magnitude as to render the hearing unfair" (*Eagles v. United States*, 329 U. S. 304, 312); a finding "that the court had no jurisdiction to try the petitioner, or that in its proceedings his constitutional rights have been denied" (*Bowen v. Johnston*, 306 U. S. 19, 24). Accordingly, in numerous instances habeas corpus review of federal convictions was granted, despite the failure of the petitioner to exhaust his appellate remedy, where such basic error was raised. *Bowen v. Johnston*, *supra*; *Ex parte Lange*, 18 Wall. (U. S.) 163; *Matter of Gregory*, 219 U. S. 210; *In re Heff*, 197 U. S. 488; *Ex parte Hudgings*, 249 U. S. 378; *Manning v. Biddle*, 14 F. 2d 518 (C. A. 8); cf. *Ex parte Baine*, 121 U. S. 1; *Ex parte Yarbrough*, 110 U. S. 651; *Ex parte Wilson*, 114 U. S. 417. In those cases where failure to appeal a federal conviction was held a bar to habeas corpus, it appears most clearly that questions not cognizant upon habeas corpus were raised; as to such matter, which could be raised *only* by appeal, the failure to appeal was decisive—not because of the failure, but because of the matter raised. *Riddle v. Dyche*, 262 U. S. 333; *Harlan v. McGougin*, 218 U. S. 442; *Eagles v. United States*, *supra*; *Sunal v. Large*, 332 U. S. 174; *Craig v. Hecht*, *supra*; *United States v. Valente*, 264 U. S. 563. In *Sunal v. Large* the Court made explicit the proposition that failure to appeal affects habeas corpus jurisdiction only "where the error does not trench on any constitutional rights" (332 U. S., at 182); the Court suggested that it intended to affirm rather than to disturb the doctrine of those cases which granted the writ, irrespective of prior appeal, where



"the trial or sentence by a federal court violated specific constitutional guaranties (*id.*, at 178-179).

We do not think that a different result follows in the review of a state conviction. Of course, such a conviction brings into play considerations of comity. But they do not warrant the conclusion for which respondent here presses. "Rules of comity or convenience must give way to constitutional rights." HOLMES, J., in *Oklahoma Natural Gas Co. v. Russell*, 261 U. S. 290, 293. Comity is founded on that deference owed to the states which requires federal abstention from action while the state processes are still not at an end. *Darr v. Burford*, 339 U. S. 200, 204; *Wade v. Mayo*, 334 U. S. 672, 680; *Frank v. Mangum*, 237 U. S. 309, 328. Where, as here, those processes are, as we are informed by the courts of North Carolina, at an end, comity no longer bars federal habeas corpus review. Comity does not further require enforcement in the federal courts of the state judgment that because of an alleged failure to exhaust a state remedy no longer available, basic federal constitutional rights are forfeit. *United States ex rel Rooney v. Ragen*, 158 F. 2d 346, 352, 353 (C.A. 7), *cert. den.* 331 U. S. 842. The exhaustion requirement has always been considered not an expression of a lack of federal power, but an exercise of federal discretion. *Ex parte Royall*, 117 U. S. 241; compare Report of Judicial Conference of Senior Circuit Judges (1943) 23, with Report of Judicial Conference of Senior Circuit Judges (1947) 18 and 28 U. S. C. A. § 2254.<sup>21a</sup> Whatever harsh inequities might necessarily evolve from a lack of jurisdiction, it is clear that here the weight to be accorded to the considerations of comity above-mentioned rests in the discretion of this Court—a discretion which, we submit, is not required by reason or authority to be so

<sup>21a</sup> The statute proposed in the earlier Report would, as compared with that later proposed and adopted, have deprived the federal courts of habeas corpus jurisdiction where state remedies had not been exhausted.

exercised as to work a forfeiture of human life. *Jones v. Kentucky*, 97 F. 2d 335, 336, 338.

It is well settled that the failure to exhaust a state remedy is not an automatic, mechanical bar to federal habeas corpus. Thus, of course, if the remedy is, by its nature, inadequate, then by the terms of § 2254, it need not be exhausted. Similarly, if because of the interference by state officials with his right to appeal or for other excusable cause the petitioner fails to exhaust a state remedy, he may still gain access to federal habeas corpus. *Jennings v. Illinois*, 342 U. S. 104; *Dowd v. United States ex rel Cook*, 340 U. S. 206; *Williams v. Kaiser*, 323 U. S. 471; *Smith v. O'Grady*, 312 U. S. 329. This case could rest on the foregoing authority for the reason that the failure to complete the appeal was for cause as valid as that which obtained in the cited cases. The disallowance of the appeal by the North Carolina courts, was so unreasonable and arbitrary as to violate the constitutional guarantee of equal protection of law (see pp. 34-36 *supra*); in such circumstances, the failure to exhaust the appeal—if failure there was—is no bar. And were that disallowance less than unconstitutional, still, this Court may determine for itself whether the circumstances surrounding the late perfecting of the appeal by petitioners justified or excused the delay, or were such as to cause a “waiver” of the right to urge federal constitutional rights. *Davis v. O'Hara*, 266 U. S. 314; *Parker v. Illinois*, 333 U. S. 571. We think that the facts fail to sustain any waiver, but, to the contrary, establish good cause. Proof of waiver, where fundamental constitutional rights are involved, must be clear and unequivocal. *Johnson v. Zerbst*, 304 U. S. 458, 464, 465. Here petitioners did not knowingly and deliberately follow a course which would foreclose the assertion of constitutional rights. *Glasgow v. Boyer*, 225 U. S. 429, 429-430; *Parker v. Illinois*, *supra*. Nor did petitioners purposely decide to forego an

appeal, and then, as an afterthought, proceed by habeas corpus when the time to appeal had expired. *United States ex rel. Hanson v. Ragen*, 166 F. 2d 608 (C.A. 7), *cert. den.* 334 U. S. 849. Here every act of petitioners negated any intent to abandon, forego, or waive their right to appeal. The appeal was not available only for good reasons inconsistent with any purpose of waiver. For purposes of this proceeding, irrespective of the constitutionality of the North Carolina Supreme Court disallowance of the appeal, it should be found that petitioners did not, by their failure to perfect their appeal, waive the constitutional rights here asserted; that such failure stemmed from good and sufficient reasons; and that appeal to the North Carolina Supreme Court may, therefore, be treated as exhausted, non-available, or inadequate in this case within the meaning of § 2254.

Moreover, as we read the decisions in this Court, absent proof of an affirmative waiver, the failure to exhaust the appeal is here no bar apart from proof of sufficient cause for such failure. For this purpose we put to one side, as inapplicable, those cases where federal review was sought prior to conviction in the absence of special exigencies. *New York v. Eno*, 155 U. S. 89; *Whitten v. Tomlinson*, 160 U. S. 231; *Baker v. Orice*, 169 U. S. 284. Similarly inapplicable are those cases where review was sought, after failure to appeal or to pursue a writ of error to this Court, as to matter not properly the subject of review by habeas corpus at any time and reviewable, if at all, only by such appeal or writ of error. *Goto v. Lane*, 265 U. S. 393; *Ashe v. United States ex rel. Valotta*, 270 U. S. 424; *Kohl v. Lehlback*, 160 U. S. 293; *Storti v. Massachusetts*, 183 U. S. 138; *Crossley v. California*, 168 U. S. 640; *Valentina v. Mercer*, 201 U. S. 131; *Knewel v. Egan*, 268 U. S. 442, 445-6; *Andrews v. Swartz*, 159 U. S. 272; *In re Wood*, 140 U. S. 278; *Kaizo v. Henry*, 211 U. S. 146. And

the question here considered is likewise not determined by those cases wherein questions cognizant in a habeas corpus proceeding are raised but not decided for failure to sue by writ of error to this Court. *Ex parte Royall*, 117 U. S. 241; *Matter of Spencer*, 228 U. S. 652; *Tinsley v. Anderson*, 171 U. S. 101; *Reid v. Jones*, 187 U. S. 153; *Urquhart v. Brown*, 205 U. S. 179; *Markuson v. Boucher*, 175 U. S. 184. For from 1789 to 1872 the time to sue out such a writ was five years from date of judgment (see, e.g. *Brooks v. Norris*, 11 Howard (U. S.) 204); and from the Act of June 1, 1872, c. 255 § 2 (17 Stat. 196) to the Act of September 6, 1916, § 6 (39 Stat. 729), the time period was two years (*Allen v. Southern Pac. R. Co.*, 173 U. S. 479; *Cummings v. Jones*, 104 U. S. 419). For this reason, it appeared clearly from some of the foregoing cases (*Urquhart v. Brown*, *supra*, at 183; *Markuson v. Boucher*, *supra*, at 187; see also *Tinsley v. Anderson*, *supra*; *Reid v. Jones*, *supra*) that when the Court denied the writ of habeas corpus time still remained to proceed by writ of error.

Passing the foregoing cases as inapplicable, therefore, we note first those where, without notice or comment by the Court, failure to exhaust a state remedy or writ of error was no bar to a granting of the writ or consideration of the questions raised on the merits. *Matter of Moran*, 203 U. S. 96; *Minnesota v. Barber*, 136 U. S. 313; *Rogers v. Peck*, 199 U. S. 425; cf. *Ex parte Hull*, 312 U. S. 546. Similarly suggestive of the availability of federal review of fundamental federal questions, without regard to whether state remedies have been exhausted, is *Brown v. Mississippi*, 297 U. S. 278, 286-287, where the Court deemed irrelevant the failure on the trial to raise objection to error which renders the entire proceedings void. And while the Court has referred to considerations of orderly administration of justice in the state courts, a factor which might require,



at the risk of forfeiture, perfecting of an appeal (*Matter of Spencer*, 228 U. S. 652, 659-661), it has never held that, absent a clear waiver, federal habeas corpus is not proper to review fundamental constitutional questions when no state remedy is any longer available. See Note, 40 *Columbia Law Rev.* 535, 537; 34 *Minnesota Law Rev.* 653, 658; 61 *Harvard Law Rev.* 657, 666. To the contrary, although the question was raised but not passed on in *Wade v. Mayo*, 334 U. S. 672, it was said in *Mooney v. Holohan*, 294 U. S. 103, 115, that the exhaustion requirement extended "to whatever judicial remedy afforded by the State may still remain open"; constitutional questions raised were reviewed on the merits in *Ashe v. United States ex rel Valotta*, 270 U. S. 424, although no writ of error was sought from the state conviction; and it was indicated in *Woods v. Nierstheimer*, 328 U. S. 211, 217, that if no state relief is available by means of a state remedial route which petitioner had apparently allowed to lapse, and the petitioner claimed he was imprisoned in violation of the Constitution of the United States, "... the federal courts would be available to provide a remedy to correct such wrongs." See *United States ex rel Rooney v. Ragen*, 158 F. 2d 346, 352, *cert. den.* 331 U. S. 842. These views are in accord with the basic notion that habeas corpus is the appropriate instrument where, but for the writ, the petitioner would be remediless. *House v. Mayo*, 324 U. S. 42, 46; *Ex parte Hawk*, 321 U. S. 114, 118; *Waley v. Johnston*, 316 U. S. 101. As the Court said when urged to dismiss a petition because of the petitioner's failure to exhaust a federal appeal:

"... it necessarily follows that no legal procedural remedy is available to grant relief for violation of constitutional rights, unless the courts protect petitioner's rights by *habeas corpus*. Of the contention that the law provides no effective remedy for such a depriva-

tion of rights affecting life and liberty, it may well be said . . . that it 'falls with the premise.' *Johnson v. Zerbst*, 304 U.S. 458, 467.

We conclude, similarly, that where, as here: (1) fundamental constitutional questions are raised; (2) no state remedies are now available; and (3) those remedies not exhausted, and no longer available, were not affirmatively waived by petitioners,<sup>22</sup> the requirements of § 2254 have been satisfied and relief in federal habeas corpus may be had. Reason, common sense, and humanity dictate this conclusion; discretion to defer to such dictates exists; and no decision of this Court is to the contrary. The Great Writ should be maintained as the ultimate recourse of those who are subjected to loss of life or liberty without the due process of the law. For this purpose, it must remain as elastic and flexible as the demands of equity require. Its proper applicability to the case at bar has been recognized in a precisely analogous case. *United States ex rel Auld v. New Jersey*, 187 F. 2d 615 (C.A. 3); see also *Thomas v. Duffy*, 191 F. 2d 360 (C.A. 9); *Bacom v. Sullivan*, 194 F. 2d 166 (C.A. 5); *Ekberg v. McGee*, 194 F. 2d 178 (C.A. 9); *United States ex rel. White v. Walsh*, 174 F. 2d 79 (C.A. 7); *Spence v. Dowd*, 145 F. 2d 431 (C.A. 7). The writ should here be allowed so that petitioners may have their innocence or guilt of the ultimate charge, for which they are now detained, determined by the fair trial vouchsafed in such cases by the Constitution.

<sup>22</sup> Of course, the limited scope of habeas corpus review, as compared with an appeal, will effectively deter convicted defendants from foregoing an appeal and proceeding by habeas corpus. See 40 *Columbia Law Rev.* 535, 539; 97 *Univ. of Pennsylvania Law Rev.* 285, 287; 34 *Minnesota Law Rev.* 653, 659.

### Conclusion

Petitioners pray that a writ of certiorari issue to the United States Court of Appeals for the Fourth Circuit to review its judgment and that upon such review the judgment be reversed.

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BENNIE DANIELS,  
*Petitioners.*

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

20  
No. 620

BENNIE DANIELS AND LLOYD RAY DANIELS,  
*Petitioners,*

*vs.*

ROBERT A. ALLEN, WARDEN, CENTRAL PRISON OF THE  
STATE OF NORTH CAROLINA, RALEIGH, NORTH CAROLINA

PETITIONERS' REPLY BRIEF

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 626

BENNIE DANIELS AND LLOYD RAY DANIELS,

*against*

*Petitioners,*

ROBERT A. ALLEN, WARDEN, CENTRAL PRISON OF THE  
STATE OF NORTH CAROLINA, RALEIGH, NORTH CAROLINA

REPLY BRIEF FOR PETITIONERS

ARGUMENT

I

In Points I and II of his argument, respondent contends that neither the jury nor the confessions questions may be the subject of collateral attack by federal habeas corpus. Matters pertaining to the exclusion of Negroes from juries, according to respondent, "are considered as irregularities" and the admission into evidence of coerced confessions "are viewed as matters of evidence" and therefore neither is the subject of federal habeas corpus review. In the light of the authorities and principles discussed by petitioners in their main brief on the scope of federal habeas corpus review of state court convictions, we think the foregoing argument by

respondent to be so specious as virtually to amount to a concession that federal habeas corpus is an appropriate remedy for the matters here raised. Indeed, in view of the heavy reliance placed by petitioners upon the recent decision of this Court in *Jennings v. Illinois*, 342 U. S. 104, and the total absence of any reference to or discussion of that case by respondent, we think that for purposes of this case respondent has acknowledged that the kind of questions here raised are the kind of questions proper for consideration on federal habeas corpus.

## II

On the question of the exclusion of Negroes from Pitt County juries, the respondent suggests that since petitioners pleaded to the bill of indictment without having first moved to quash the bill, the petitioners waived any objections to the selection of the grand jury. The motion to quash was, in fact, made after petitioners pleaded to the indictment, and it is furthermore true that under local practice the failure to move to quash prior to pleading to the indictment could constitute a waiver of the right to challenge the composition of the grand jury. However, in this connection it should first be pointed out that petitioners pleaded without moving to quash while represented by court-appointed counsel and before they were represented by counsel of their own choice (see 4 S. Tr. 2-3). Moreover, no objection was made by the prosecution upon the trial to the motion to quash on the ground that the motion was not timely, nor did the prosecution offer any objection for that reason to the introduction of evidence by petitioners as to the exclusion of Negroes from the grand jury. Indeed, the trial court permitted without comment the introduction of such evidence and at the conclusion of the trial made its findings of fact and conclusions of law exclusively in terms of the insufficiency of the evidence to estab-

lish discrimination (see 4 S. Tr. 1-22).<sup>1</sup> While the trial court could have, under local law, dismissed the motion as untimely and that ruling would have been discretionary and non-reviewable, the trial court did pass upon the motion on its merits and therefore the ruling was reviewable as if the motion had been timely (*State v. DeGraff*, 113 N. C. 689, 690, 691; *State v. Miller*, 100 N. C. 544, 545). In view of the failure of the prosecution to raise any objection to the motion to quash on the grounds of untimeliness, and in view of the circumstance that the trial court without comment permitted petitioners to make the motion to quash and to introduce evidence thereon and thereafter ruled on the motion on its merits, respondent may not now avoid a consideration on the merits of the exclusion of Negroes from the grand jury for any alleged failure by petitioners to make timely motion to quash (cf. *United States v. Ju Toy*, 198 U. S. 253, 261). In any event, as the challenge to the array of petit jurors was timely, the demonstration of the intentional discrimination against Negroes in the selection of petit juries in Pitt County is properly before the Court and by itself warrants the relief sought by petitioners.

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<sup>1</sup> At the conclusion of the hearing on the discrimination question the trial court did orally state as follows:

"The Court, I am holding that in the manner and method of selecting a jury the board of County Commissioners have not intentionally or otherwise discriminated in any respect or any way or against any person by reason of race, color or creed of servitude, and the motion to quash having been made after the plea to the indictment it comes at a time when the defendant cannot insist upon it as a matter of right but at which the ruling is in the discretion of the court and for that reason I am dismissing and will sign formal order in writing and give you an exception to it (S. Tr. 167).

It is unclear whether the expression "for that reason" refers to the finding that there was no discrimination or the lack of timeliness. In view of the more formal findings and rulings (4 S. Tr. 1-22), which are premised entirely upon an absence of the showing of discrimination, it may be concluded that it was the intention of the trial judge to base his decision upon the evidence rather than the time when the motion to quash was made.



The discussion by respondent concerning the evidence on the exclusion of Negroes from juries in Pitt County, requires very little comment. Apart from the irrelevant animadversions by respondent to petitioners' "idealistic concepts" of the right of a Negro defendant to be free from discrimination against members of his race in the selection of jurors, respondent fails to offer any reason or explanation—plausible or otherwise—why less than 2% of the persons selected by the jury commissioners as eligible to serve as jurors were Negroes although the percentage of Negroes qualified for jury duty in Pitt County was patently far in excess of any such percentage.

Respondent would appear to suggest that a fair percentage of Negroes served on petit juries in Pitt County. That such could not have been the case is abundantly clear from the record. Thus the trial judge found that prior to 1947 no Negro had served on a grand jury in Pitt County in more than 20 years and "members of the Negro race were occasionally called, summoned and served for jury duty" (R. 307). These findings are of course accepted and not challenged by respondent. For the period from 1947 to 1949 grand and petit jurors were selected from the 1947 jury list, which list contained less than 2% Negroes—a calculation undisputed by respondent. Plainly, then, the number of Negroes who served on juries after 1947 was only infinitesimally greater than the number who served prior to 1947. Thus David T. House, Clerk of the Superior Court of Pitt County since July 3, 1945, testified that since his term of office there had been eleven drawings of grand juries yielding a total of 99 grand jurors, eighteen each year, and of the composition of those grand juries he said:

Q. During the time you have been clerk is my information correct that on the grand jury there have been no negroes?

A. Yes, sir, there have not.

Q. There has not been one on the grand jury?

A. Not since 1945 until today.

The Court: How do you know that?

A. There is no record but I don't remember seeing one. My recollection is no negroes have served on the grand jury but there is no way of telling from my records because no distinction made between the two.

Q. You have been present at every grand jury sitting and every court since 1945?

A. Yes, sir.

Q. You have never seen a negro on the grand jury?

A. I don't recall one." (R. 121)

No substantial difference existed with respect to the composition of petit juries (see R. 127, 128).

### III

In respondent's brief in opposition the alleged statement of facts and the alleged recital of the evidence in connection with the confessions admitted into evidence are argumentative in the extreme and are plainly calculated to convey the impression that the guilt of petitioners is plain and overwhelming. Petitioners have made every effort to confine their discussion of the evidence to facts not in controversy and where controversy concerning the evidence did exist the same was explicitly indicated. We think that the question of innocence or guilt is here irrelevant for neither innocence nor guilt is decisive of the propriety of the trial and other processes here challenged. *Eisenba v. California*, 314 U. S. 219, 236, 237; *Haley v. Ohio*, 332 U. S. 596, 599; *Malinski v. New York*, 325 U. S. 401, 404. Nevertheless petitioners deem it incumbent upon them to point out to the Court that the evidence heretofore adduced at the state trial and in the federal *habeas corpus* proceeding demonstrates not their guilt but, to the contrary, their innocence and the utiliza-

tion by local police officers of brutality and coercion as a substitute for civilized police methods.<sup>2</sup>

Upon their earlier petition for writ of certiorari, filed with this Court during the October Term, 1949, Misc. No. 412,—to which brief this Court is now respectfully referred—petitioners fully analyzed the evidence in the state court and demonstrated, conclusively we think, that the state's version of the petitioners' alleged participation in the murder of O'Neal is so utterly implausible as to be virtually incapable of credulity; that the confessions offered in evidence by the state are inconsistent with each other, are suspect because of the admitted circumstances by which they were obtained and, indeed, by their physical appearance, and each of the said alleged confessions has been convincingly denied by petitioners; and that petitioners proved by the testimony of a disinterested and, in fact, hostile witness, a complete alibi (see S. Tr. 553, 554; see also S. Tr. 555-563). In a further effort to impute guilt to petitioners respondent repeatedly refers to at least three other instances where each of the petitioners is alleged to have made, freely and voluntarily, oral confessions. Of course, even if such confessions had been made they would not rectify the erroneous admission into evidence of the written confessions which we have shown to be obtained under inherently coercive circumstances, *Stroble v. California*, 20 U. S. Law Week 4244. Moreover, the alleged proof of each of these alleged confessions is plainly prosecution-tailored.

The first of the confessions was said to have occurred,

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<sup>2</sup> Respondent's misleading recital of the evidence is demonstrated by his frequent reference to the fact that each of the petitioners was fully clad at the time each was apprehended—apparently to convey the suggestion that each was on the verge of or intended fleeing the arresting police officers. The testimony, at pages 203, 210-211, at the habeas corpus proceeding, by Sheriff Tyson directly contradicts any suggestion that petitioners, at the time each was apprehended, made any attempt to flee.

in the instance of each petitioner, almost immediately upon his apprehension. This Court will readily appreciate that, in view of its rule of passing upon confessions only on the basis of the uncontradicted and undisputed evidence, such testimony, if believed by a jury, renders such confessions virtually invulnerable under the Due Process Clause of the Fourteenth Amendment. Police officers intent upon obtaining confessions by third degree or other coercive measures would not cavil at testifying that immediately upon arrest a confession was uttered for by such testimony assurance can be obtained that a conviction, once had, will be virtually immunized from appellate review, and particularly review by this Court. These considerations strongly suggest the motivation for the implausible testimony of the police officers that petitioners, having been warned and advised fully by the police officers of their rights, including their right to remain silent, nevertheless without any inducement, promises, coercion or urging on the part of the police officers, fully and freely volunteered to acknowledge their guilt.

Similarly prosecution-tailored is the evidence belatedly proffered by the state that in May of 1949 the petitioner Lloyd Ray Daniels made a full confession to a social worker at the state mental institution where the petitioner was then lodged (see *Habeas Corpus* Transcript 234,235). The said alleged confession was made in May of 1949 and the trial of the petitioners was in June of that same year. Yet, although the aforesaid trial was widely publicized in the State of North Carolina, the alleged confession was reputedly not brought to the attention of the prosecution, nor was it offered in evidence. And, of course, this last mentioned alleged confession was dictated by the social worker out of the presence of the petitioner, Lloyd Ray Daniels, and was never seen or signed by the latter. *Habeas Corpus* Tran-



script, 236-237. With respect to this alleged confession, Lloyd Ray Daniels testified as follows:

“Q. You heard Mr. Johnson, Social Worker from the State Hospital yesterday say you confessed to him in Goldsboro that you committed this crime?”

A. Yes, sir.

• Q. Do you recall making any such confession to him?

A. No, sir.

Q. While in the hospital at Goldsboro were any drugs given to you?

A. Yes, sir.

Q. State what effect it had?

A. They give us some kind of shots in us arms and when they give you them shots you can't stand up and lay you down to give you the shot and when they give them to you you feel your mind and tension leaving you.

The Court: You mean memory?

A. Yes, sir. Your mind leaving you. They still talking to you about your mind just going away” (*Habeas Corpus* Transcript, 323, see also 233).

#### IV

Respondent construes petitioners' arguments concerning the discriminatory denial by the Supreme Court of North Carolina of an appellate remedy to be a special pleading on behalf of members of the Negro race. Respondent, apparently ever-conscious and ever-sensitive of racial considerations, would have this Court believe that petitioners are arguing that some special right to appeal in the courts of the State of North Carolina should belong to Negro defendants as compared with white defendants. And in support of respondent's position, all of the lawyers who have represented petitioners, with the exception of court-appointed counsel who saw fit not to challenge the composition of the grand jury, are flagellated in one manner or another as

solely and exclusively responsible for the present dilemma of petitioners.

It is hardly necessary to point out to this Court that respondent has misconstrued the import of the petitioners' argument. For we say that in all the circumstances the refusal by the North Carolina Supreme Court to exercise the discretion available to it, at the least to allow an appeal, was a denial of an appellate remedy in a manner and fashion violative of the Fourteenth Amendment. We do not suggest that the foregoing abuse of discretion was motivated by any racial or other obnoxious considerations. We point only to the fact that because of a one-day delay in the service of the case on appeal, which delay worked no prejudice to the prosecution and did not deprive the Supreme Court of North Carolina of its jurisdiction, that Court foreclosed to defendants in a capital case any appellate review of concededly substantial federal constitutional questions. As this Court remarked in *Neal v. Delaware*, 103 U. S. 370, 396: " . . . with entire respect for the court below, . . . the circumstances, in our judgment, warranted more indulgence, in the matter of time, than was granted to a prisoner whose life was at stake . . . "

Only one point in the argument of respondent concerning the effect of any alleged failure by petitioners to exhaust their state appellate remedy requires consideration. Respondent cites the decision of this Court in *Goto v. Lane*, 265 U. S. 393, as decisive on this point. According to respondent, that case is authority for the proposition that where there has been a failure to exhaust a state remedy and that remedy is no longer available, such failure is an absolute bar to a subsequent federal *habeas corpus* proceeding. We think that *Goto v. Lane* does not stand for such an extreme, formalistic position.

The petitioners there had been convicted in a territorial circuit court for the Territory of Hawaii on an indictment for an infamous crime against the laws of that Territory. In several instances the indictment ineptly and incorrectly used the disjunctive "or" instead of the conjunctive "and". Mr. Justice VAN DEVANTER noted for the Court that the foregoing error was not prejudicial to the defendants, nor had the indictment been challenged at the trial because of any alleged uncertainty—to the contrary, it was stipulated that the indictment be considered and understood as reading in the conjunctive instead of in the disjunctive and that any defect arising from the use of the disjunctive was waived. Apart from the stipulation, no change was made in the indictment proper. After conviction an appeal was taken and upon that appeal the indictment was challenged as uncertain and the stipulation as void as having had the effect of amending the indictment without resubmission to the grand jury. The conviction was not disturbed on the appeal; and of the foregoing contentions it was found that the stipulation had not acted to amend the indictment and that the indictment as drawn was not vague and uncertain. The defendants, having proceeded by a bill of exceptions, could not under the applicable decisions thereafter obtain review by the United States Supreme Court by writ of error; such review by the Supreme Court could have been had only if the convicted defendants had appealed in the first instance by writ of error instead of reserved exceptions; "The petitioners, however, elected to proceed the other way" (265 U. S., 401).

*Goto v. Lane* was in the foregoing posture when federal habeas corpus was sought. Upon the habeas corpus proceeding the same assertions of amendment and uncertainty of the indictment were raised.

It is immediately apparent, therefore, that at least two factors were present in *Goto v. Lane* which are not here

involved: (1) the point relied upon in the habeas corpus proceeding had been explicitly waived upon the trial; and (2) the defendants had knowingly, purposefully and intentionally followed an appellate course which precluded review by the United States Supreme Court of the constitutional questions raised (cf. *Parker v. Illinois*, 333 U. S. 571).

Moreover, notwithstanding the fact that the defendants in *Goto v. Lane* had themselves very narrowly confined the area of federal review, this Court nevertheless proceeded to a consideration of the issues in a manner which is strongly suggestive that despite the foregoing waivers, federal habeas corpus relief was not absolutely and completely barred. Thus it was said:

“The instances in which it [federal habeas corpus] is granted, when the law has provided another remedy in regular course, are exceptional, and usually confined to situations where there is peculiar and pressing need for it, or where the process or judgment under which the prisoner is held is wholly void.” (265 U. S., 401-402.)

Even more significantly, when Mr. Justice VAN DEVANTER came to consider the effect of the decision of the Court in *Ex parte Bain*, 121 U. S. 1, where it was held that the amendment of an indictment without resubmission to the grand jury renders the indictment void, Mr. Justice VAN DEVANTER did not say that habeas corpus must be denied for failure to appeal irrespective of whether the indictment was thus made void; instead he stated:

“But, as was said by the supreme court of the territory, the indictment here was not amended. The purpose of the stipulation was not to alter or change the indictment, but to show that the parties construed and understood the accusation in a particular way, and desired the court to do the same. Had the court done



so without the stipulation, that might have been an error in the exercise of jurisdiction, but it would not have worked an entire disability to proceed to a trial and judgment. And had the accused been acquitted, it hardly would be said that the acquittal was void. The stipulation did not alter the situation in these respects." (265 U. S., 402-403.)

In the circumstances, the decision in *Goto v. Lane* is the same decision which would have been rendered had a petition for habeas corpus been instituted after a timely filing of writ of error to the United States Supreme Court. The import of the decision in *Goto v. Lane* was that the kind of question raised was the kind which could be construed only upon an appeal and never upon habeas corpus; the fact that the time to appeal had expired and appellate review was therefore no longer available was not a basis for habeas corpus jurisdiction if such jurisdiction did not otherwise exist. And to the extent that in *Goto v. Lane* there was raised the kind of question cognizant in a habeas corpus proceeding, the Court proceeded to consider that question on the merits and made no allusion to the failure to appeal.

*Goto v. Lane*, and no other case decided by this Court, is authority for the proposition that the failure to exhaust appellate remedies no longer available, absent an affirmative waiver, is a bar to federal habeas corpus review where the petitioner—as here—raises questions of the kind and nature appropriate upon habeas corpus.

**Conclusion.**

Petitioners pray that a writ of certiorari issue to the United States Court of Appeals for the Fourth Circuit to review its judgment and that upon such review the judgment be reversed.

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~~No. 271~~ MISC. **20**

BENNIE DANIELS AND LLOYD RAY DANIELS,  
PETITIONERS,

VS.

ROBERT A. ALLEN, WARDEN OF THE CENTRAL  
PRISON OF NORTH CAROLINA,  
RESPONDENT.

BRIEF OF ROBERT A. ALLEN, WARDEN OF THE CENTRAL  
PRISON, RESPONDENT, OPPOSING PETITION FOR  
WRIT OF CERTIORARI.

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IN THE  
Supreme Court Of The United States

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OCTOBER TERM, 1951

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No. 271, Misc.

BENNIE DANIELS AND LLOYD RAY DANIELS,  
PETITIONERS,

VS.

ROBERT A. ALLEN, WARDEN OF THE CENTRAL  
PRISON OF NORTH CAROLINA,  
RESPONDENT.

---

BRIEF OF ROBERT A. ALLEN, WARDEN OF THE CENTRAL  
PRISON, RESPONDENT, OPPOSING PETITION FOR  
WRIT OF CERTIORARI.

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STATEMENT OF THE CASE

The petitioners, Bennie Daniels and Lloyd Ray Daniels, have applied to this Court for a writ of *certiorari* for the purpose of having this Court review a decision of the United States Court of Appeals for the Fourth Circuit, the same being No. 6330, decided November 5, 1951, ..... Fed. (2d) .....

The transcript of evidence and other proceedings in the trial of petitioners in the State Court, the same being the Superior Court of Pitt County, consists of four volumes which are a part of the record in this case. References to this transcript will be referred to as the State Transcript and abbreviated as "S.Tr.". There is also a transcript of

evidence in the Federal Court which resulted from the hearing on the *habeas corpus* proceeding which we refer to as Federal Transcript and in this brief will be abbreviated as "F.Tr."

The procedural history of this case is as follows:

1. The petitioners were indicted by a bill of indictment returned by the Grand Jury of Pitt County, North Carolina at the March Term, 1949, of the Superior Court charging them with murder in the first degree for the killing of William Benjamin O'Neal. (S.Tr. Vol. 1, p. 168) Two members of the Pitt County Bar were appointed by the Court to defend the petitioners, and the petitioners were arraigned upon a bill of indictment and entered pleas of not guilty. (S.Tr. Vol. 4, p. 2) The case was continued, and the petitioners were sent to the State Hospital at Goldsboro for mental examination. At the April Term of Court, the petitioners retained counsel of their own choice, Herman L. Taylor, of the Wake County Bar, and C. J. Gates, of the Durham County Bar, and counsel theretofore appointed by the Court were discharged. The psychiatrist at the State Hospital at Goldsboro having reported that the petitioners should stand trial from a mental standpoint, the petitioners were placed on trial on the 30th day of May, 1949.

2. Upon the calling of the case and after petitioners had been arraigned and entered pleas of not guilty at a former term, the petitioners moved to quash the indictment and challenged the array of petit jurors, alleging exclusion of Negroes from the Grand and petit juries of Pitt County because of race. The trial judge heard the evidence and made findings of fact and overruled the motion to quash and the challenge to the array. (S.Tr. Vol. 1, pp. 2-167) Findings of fact in order of the State trial judge will be found in S.Tr. Vol. 4, pp. 4-22. During the progress of the trial, the State offered in evidence certain confessions of the petitioners, and in the absence of the jury, the State trial judge passed upon the question of the voluntariness of the confessions and found that the same had been freely and voluntarily made and allowed the confessions to be

used in evidence. As to this hearing on the confessions, see S.Tr. Vol. 1, p. 268, and for the confessions themselves which were reduced to writing, see S.Tr. Vol. 1, pp. 273-276, Exhibit 8; pp. 276-278, Exhibit 9; and pp. 363-364, Exhibit 32.

3. The petitioners were convicted of murder in the first degree in the Superior Court of Pitt County, without recommendation of life imprisonment, and sentence of death was imposed in accordance with the laws of the State on the 6th day of June, 1949. Notice of appeal to the Supreme Court of North Carolina was given in open Court (S.Tr. Vol. 4, p. 681), and in accordance with the law of the State (§1-282 of the General Statutes), the petitioners were allowed sixty days from the date of judgment in which to serve statement of case on appeal, and the State was allowed forty-five days in which to serve exceptions or counter case. On August 6, 1949, counsel for petitioners attempted to serve statement of case on appeal by merely leaving the statement of case on appeal in the office of the prosecuting attorney for the State with his secretary. The solicitor or prosecuting attorney for the State filed exception to the petitioners' statement of case on appeal and also entered a motion to strike out the petitioners' statement of case on appeal because the same was not served within the time fixed by law and by the Court. The matter was heard by the State trial judge on the 29th of September, 1949, and the State's motion to strike out the statement of case on appeal was allowed, the order carrying out the motion being entered on the first day of October, 1949.

4. Prior to the entry of the order striking out the case on appeal, counsel for petitioners filed a petition for *certiorari* in the Supreme Court of North Carolina, on September 27, 1949, and a supplemental petition for *certiorari* was also filed by counsel for petitioners in the Supreme Court of North Carolina on October 10, 1949. An affidavit was also filed by Herman L. Taylor, of counsel for the petitioners, in the Supreme Court of North Carolina on October 10, 1949, and other papers. On November 2, 1949, the Supreme Court of North Carolina dismissed these applica-

tions for *certiorari*, the decision being reported as *STATE v. DANIELS*, 231 N. C. 17, 56 S.E. (2d) 2.

5. During the month of November, 1949, petitioners, after notice, filed a petition in the Supreme Court of North Carolina for a writ of error *coram nobis*. The State filed answer to this petition, and on December 14, 1949, the Supreme Court of North Carolina issued its decision, the same being reported as *STATE v. DANIELS*, 231 N. C. 341, 56 S.E. (2d) 646.

6. Thereafter, the State filed a motion in the Supreme Court of North Carolina to docket the record and dismiss the appeal under Rule 17 of the Rules of the Supreme Court of North Carolina, and upon this motion, the Supreme Court of North Carolina issued an opinion dismissing the appeal which is reported as *STATE v. DANIELS*, 231 N. C. 509, 57 S.E. (2d) 653.

7. On March 2, 1950, the Chief Justice of the Supreme Court of North Carolina entered an order staying execution on the judgment, and petitioners filed an application in this Court for a writ of *certiorari*, and on May 8, 1950, this Court issued its decision denying the application for writ of *certiorari*. See *DANIELS v. NORTH CAROLINA*, 339 U. S. 954, 94 L.ed. 1366. This denial was without any dissent.

8. Petitioners then filed another petition in the Supreme Court of North Carolina on the 11th day of May, 1950, seeking a writ of error *coram nobis*. The State filed answer to this petition, and on May 24, 1950, the Supreme Court of North Carolina issued its decision denying this application, the same being reported as *STATE v. DANIELS*, 232 N. C. 196, 59 S.E. (2d) 430.

9. The petitioners then filed application and petition for writ of habeas corpus in the District Court of the United States for the Eastern District of North Carolina. The District Court issued a stay of execution and the respondent, Warden of the Central Prison, filed return and answer to the writ on June 20, 1950. Hearings were held on this petition, and the answer and return made thereto on December 18, 1950, through December 21, 1950, and the



case was argued before the District Judge on May 18, 1951: On July 14, 1951, the District Court filed its findings of fact, conclusions of law and opinion and issued an order remanding the petitioners to the respondent warden to the end that the judgment of the State Court be carried out. The opinion of the District Judge is reported as DANIEL v. CRAWFORD, 99 F. Supp. 208. The petitioners appealed to the United States Court of Appeals for the Fourth Circuit, certificate of probable cause and stay of execution having been issued by the District Judge.

10. The appeal was heard by the United States Court of Appeals for the Fourth Circuit on October 12, 1951, and the judgment of the District Court was affirmed by the decision of the Court of Appeals, the same being Decision No. 6330, decided November 5, 1951, and reported as ..... Fed. (2d) ..... Judge Soper filed a dissenting opinion. The petitioners then filed this petition for writ of *certiorari* which is now before this Court.

## QUESTIONS INVOLVED

The respondent submits that the questions involved on this application for *certiorari* are as follows:

1. Where petitioners raise constitutional issues on their trial in State Court and these issues are reviewable by the highest appellate Court of the State as a matter of right, and where petitioners fail to meet the conditions required by law for perfecting their appeal, have they exhausted all available State remedies as required by 28 U.S.C., § 2254?

2. Where petitioners, on their trial in State Court, challenge the Grand Jury and Petit Jury, alleging that Negroes have been excluded by reason of race and color, and the State Court determines this issue adversely to the petitioners, can this constitutional issue again be retried in a *habeas corpus* proceeding in the Federal District Court?

3. Where, upon trial of petitioners in State Court, a confession is admitted in evidence over petitioners' objection that the same was involuntary and extorted by fear and physical force in violation of the Constitution, can the

petitioners have this same constitutional issue again re-tried and redetermined in a *habeas corpus* proceeding in the Federal District Court?

4. Where petitioners have been tried in a State Court in a criminal case, and the trial judge instructs the jury according to local State practice, can the petitioners challenge the correctness of the trial judge's instructions to the jury in a *habeas corpus* proceeding in the Federal District Court?

5. Where petitioners are convicted in a criminal case in a State Court and have an absolute and unqualified right to appeal to the highest appellate Court in the State for a review of the alleged errors assigned in their case and petitioners fail to perfect their appeal and meet the conditions upon which the State grants such an appeal, can petitioners assert in a *habeas corpus* proceeding in the Federal District Court that they were unconstitutionally deprived of their right of appeal?

6. Are the petitioners in this case seeking to use a *habeas corpus* proceeding as a substitute for an appeal?

## FACTS

The respondent desires to refer to and incorporate by reference in this brief the brief filed by respondent in the United States Court of Appeals for the Fourth Circuit, and the same number of copies of respondent's brief filed in the Circuit Court of Appeals is also filed in this Court. As to the narrative of events surrounding the murder of William Benjamin O'Neal, we again state our contentions as to the facts which we laid before the Circuit Court of Appeals, as follows:

The petitioners, Bennie Daniels and Lloyd Ray Daniels, two young colored men residing in Pitt County, were seen in the Town of Greenville on the 5th of February, 1949. Bennie Daniels was armed with a knife and engaged in an altercation with the witness, James Henry Riddick. (S.Tr. Vol. 1, p. 169) After this incident, the petitioners, according to the witness, Charlie Moore, engaged in fighting in the street between nine and ten o'clock with some other

colored boys, and Bennie Daniels was again observed with a knife. There was some blood on the clothing of the petitioners. (S.Tr. Vol. 1, p. 176) At a later hour, the petitioners tried to engage the services of a taxicab from the witness, Leslie Manning, who refused to carry the petitioners in his cab. (S.Tr. Vol. 1, p. 180) The petitioners were seen by another taxicab driver, Norman Tripp, somewhere between nine and ten o'clock that night to get into the taxicab of William Benjamin O'Neal. O'Neal's taxicab was parked close to the cab of the witness. O'Neal was over talking to somebody when the petitioners got into his cab. This witness observed O'Neal get into his cab, where the petitioners were already seated and drive off in the direction of Grimesland. (S.Tr. Vol. 1, p. 182) The witness Tripp identified the petitioners from pictures shown to him by the Sheriff.

The body of William Benjamin O'Neal was found Sunday morning, February 6, 1949, at a place some miles from the Town of Greenville, near some tobacco barns located just off of a country road, by the witness, Leroy Smith, (S.Tr. Vol. 2, p. 341) Smith reported the incident to the witness Baker, who called the Sheriff of the County. (S.Tr. Vol. 2, p. 349) The place showed signs of a struggle, the door of the taxicab was open, and beside the door was an overcoat. The driving license of O'Neal was found two or three feet from the cab. The glove compartment of the cab was open, and an empty billfold was found. The taxicab permit of O'Neal was also found, with his picture attached, and also some papers with a Social Security number. O'Neal's head was crushed, his throat had been cut, and, in fact, his whole body was cut, crushed and beaten all over. Around his body were found some fifty tobacco sticks, some of which had been broken and had blood on them; and there were two bricks found near the body that had blood on them. The account of Sheriff Tyson as to what he found at the scene of the crime will be found in S.Tr. Vol. 1, p. 193. The account of Chief of Police L. D. Page will be found in S.Tr. Vol. 2, p. 306. The account of S. G. Gibbs as to the condition of O'Neal's body and the

scene of the crime will be found in S.Tr. Vol. 2, p. 357. The account of Captain S. B. Dorsey, witness for the State, as to what he found at the scene of the crime will be found in S.Tr. Vol. 2, p. 430. Other peace officers and witnesses also testified and were in substantial agreement as to what was found, although some witnesses observed things that other witnesses did not. Both new and used rubber contraceptives were found at the scene of the crime, indicating that the spot had been used as a place of assignation, but there is no evidence in the record of the race of the people who used this isolated spot for such purposes. After Bennie Daniels was arrested, he was searched and rubber contraceptives were found in his watch pocket. (S.Tr. Vol. 2, pp. 385, 441)

The overcoat found at the scene of the crime was identified as a coat belonging to William Benjamin O'Neal, the identification being made by his mother (S.Tr. Vol. 2; p. 325) and also by the witness, J. W. Phillips, who sold the overcoat to O'Neal. (S.Tr. Vol. 2, p. 356) A woman's glove had been found at the scene of the crime near the taxicab, and it was shown by the witness Faulkner that he had driven this taxicab before O'Neal had ever driven the cab and that this glove was in the taxicab when the witness Faulkner started driving the same. (S.Tr. Vol. 2, p. 353) It was also shown by the witness, J. W. Phillips, that he owned the taxicab that O'Neal was last seen driving and that this lady's glove was in the compartment of the taxicab and had been there for two months. (S.Tr. Vol. 2, p. 355) From the testimony of these witnesses, it appears that the glove had been in the taxicab for some time before O'Neal became the driver.

Upon information received by the officers and not disclosed in the record, Lloyd Ray Daniels was arrested on the following Monday morning between one and one-thirty o'clock in a tenant house on the L. O. Whitehurst farm. The house was occupied by a man by the name of Wilkes. He was found lying on a bed or cot, fully dressed, with his shoes on and all his clothes except his hat. Some cold blood was found on the back of his left ear, and there were



scratches around and under his neck and some small cuts on his hands. (S.Tr. Vol. 1, pp. 199-200) There were several officers present at this arrest, but Lloyd Ray Daniels was placed in an automobile and taken to Williamston, over in Martin County, which is a county that adjoins Pitt County. In this automobile with Lloyd Ray Daniels were Sheriff Tyson, Deputy Sheriff Manning, and S. G. Gibbs, a highway patrolman, who is now a member of the State Bureau of Investigation. See also Gibbs' testimony in S.Tr. Vol. 2, p. 357. On the way to Williamston, according to the testimony of the officers, Lloyd Ray Daniels made a statement (S.Tr. Vol. 2, p. 261) in which he admitted that he participated in killing O'Neal and gave some details of the murder. He was carried to Williamston and placed in the Martin County Jail.

The petitioner, Bennie Daniels, was arrested between five and six o'clock on Tuesday morning about a mile and a half east of the Town of Winterville on the Bryan Tripp farm. He was arrested by the Sheriff of the County, Patrolman Gibbs, and Ray Smith, a fireman. (S.Tr. Vol. 1, pp. 215, 219) The petitioner, Dennie Daniels, was placed in an automobile and carried also to Williamston, where he was placed in jail. On the way, according to testimony of the officers, Bennie Daniels admitted that he had participated in the killing of O'Neal. (S.Tr. Vol. 2, pp. 355-356) Later, on Tuesday night, on the 8th day of February, 1949, according to the evidence of the peace officers, the petitioners were both questioned in the jail at Williamston, and written confessions were made, which were signed by Bennie Daniels and were also signed by Lloyd Ray Daniels by his mark. These written confessions appear in S.Tr. Vol. 1, pp. 273 and 276. When Bennie Daniels was arrested on the Bryan Tripp farm, he was standing behind the door, fully dressed. (S.Tr. Vol. 1, p. 270) These various confessions on the part of the petitioners were used by the State in evidence. See S.Tr. Vol. 1, pp. 273-276, Exhibit 8, pp. 276-278, Exhibit 9, pp. 363-364, Exhibit 32. Further evidence on the confessions will be found in S.Tr. Vol. 1, pp. 284, 389, 391, 216, 219, 258, 259, 271, 366, 383-384. From the

above references to the transcript of evidence, it will also be seen that the petitioners denied killing O'Neal and contended that whatever statements they made were induced by fear and coercion and that they did not, in fact, admit killing O'Neal. Evidence as to the voluntariness of the confessions was introduced by both the State and the petitioners which is according to the practice in North Carolina in passing on confessions, and the Court found that the confessions were made freely and voluntarily. (S.Tr. Vol. 1, p. 268) As to the manner in which the confessions were obtained, see App. pp. 50-98, brief of respondent filed in the Circuit Court of Appeals, No. 6330.

When petitioner, Lloyd Ray Daniels, was at the State Hospital at Goldsboro, he was visited by a white man who had known him for eight or ten years. Petitioner, Lloyd Ray Daniels, told this white man about how they murdered O'Neal. The white man asked G. M. Johnson, a social worker at the hospital, to sit in on the interview and have Lloyd Ray Daniels repeat what he had already told as to the murder. There certainly was no coercion, threats or physical force used in this interview, and none has ever been shown. It should be pointed out that the State only learned of this confession during the hearing held on the *habeas corpus* at Tarboro, North Carolina. This confession was, therefore, not used at the trial. We quote Lloyd Ray Daniels' narrative of the murder as told to the social worker as follows:-

"This white man, after talking with patient at the Criminal Building, ask that Interviewer sit in and have patient repeat what he had just heard him say. Patient calmly related the following:

"He claims that he got up with Bennie Daniels and Bennie's brother on Saturday afternoon before the murder that night. They drank one pint of liquor and later drank some beer. Lloyd Ray knowing that he only had twenty-five cents in his pocket, advised these boys that he could not go with them. Bennie advised him to leave everything to him, advising that he would look after all the incidentals. It seems that patient repeatedly attempted to explain that he could not go with them but after their insisting he always did so. Bennie bought a new knife before their getting in a

taxi near the bus station. They rode approximately six miles from Greenville to a side road near which were three tobacco barns. The taxi was ordered to circle around and apparently come back on the road. Lloyd Ray sat to the right of the driver, Bennie being directly behind him in the back seat. After getting off the road, near the tobacco barns, Bennie surrounded the driver with out-stretched arms, the sharp knife facing his throat. Lloyd Ray, realizing what was happening, again stated that he did not wish to follow Bennie. The driver's throat was apparently cut before they got him on the left side of the car, where Lloyd Ray was knocked down by the driver.

"Lloyd Ray states that he started to run but was immediately tripped by Bennie, who explained what had happened, advising that patient was then as guilty as he. Neither one could deny what they had already done.

"Lloyd Ray admits that he used tobacco sticks on the driver's body. He claims that it was then around eleven o'clock. They reached his mother's home about twelve o'clock midnight. They apparently remained there until two A. M., when it was claimed that they went back to the tobacco barns, then returned home where they slept until early morning when they got up and played marbles in the yard until ten A. M.

"Lloyd Ray claims that he would have never done such a thing had it not been for Bennie who led him astray this particular night.

"This white man states that the tobacco barn was bloody inside where they apparently tried to hang the driver, but hearing his voice afterwards, it is assumed that they took him from the hanging position and dragged him outside and beat his head approximately four inches in the earth. Bennie and Lloyd Ray's clothes were bloody in front as if they held the driver up and attempted to carry him in their arms. Their clothes were found the following morning at Lloyd Ray's home. No one knew about the incident until Lloyd Ray's sister, who is a maid for someone near by, advised that she could not go to work that day because of having to wash Lloyd Ray's and Bennie's clothes. Upon immediate investigation, the clothes were found but the two boys were not located immediately.

"Lloyd Ray was found at his girl friend's house about two A.M. the following Monday morning. Bennie came

to his first cousin's house the following Tuesday morning and those living in the house informed this white man of Bennie's presence. The law "surrounded the house" and immediately took him into custody. It seems that these boys readily informed the Sheriff of what had happened and while being carried to Raleigh, they laughed at each other about the incident, advising that one was as guilty as the other."

## ARGUMENT

This case was before this Court at the October Term, 1949, No. 412, Misc., and as we have pointed out before, this Court denied *certiorari*. At that time, counsel for the respondent, in their brief, made a statement that the petitioners still had a remedy in the State Court if they would file a proper and sufficient petition for writ of error *coram nobis*. This statement is quoted by petitioners on p. 12 of their brief filed in this case. This statement was made in good faith because we thought that the first application of petitioners to the Supreme Court of North Carolina for a writ of error *coram nobis* had been dismissed because of procedural defects relating to an insufficiency of the petition rather than any defect of a substantial nature. It is apparent, however, that counsel for petitioners disagreed with this statement because in their brief, filed at the October Term, 1949, No. 412, Misc., they stated in a footnote as follows:

"It is dubious whether the suggestion of the Supreme Court afforded petitioners any real prospect of relief. The writ of error *coram nobis* is available where reliance is placed upon matter *de hors* the original record (*In re Taylor*, 229 N. C. 297, 49 S.E. 2nd 749; *id.*, 230 N. C. 566, 53 S.E. 2d 857; cf. *Taylor v. Alabama*, 335 U. S. 252; *Hysler v. Florida*, 315 U. S. 411), whereas the Federal questions here raised by petitioners involved matters in the record of the trial proceedings."

Later on, counsel filed a reply brief at the October Term, 1949, in this same case, No. 412, Misc., and in this reply brief, counsel for the petitioners stated as follows:



Respondent suggests that there is available to Petitioners further recourse to the Supreme Court of North Carolina and, therefore, that this petition is premature (Res. Br., pp. 27-28). According to Respondent, Petitioners could re-apply for writ of error *coram nobis* before the Supreme Court of North Carolina. The premise of Respondent's argument is, apparently, that the prior application was deemed insufficient for procedural rather than substantive reasons, and that a subsequent reapplication could cure the procedural error committed.\* Irrespective of whether any such further recourse to the Supreme Court of North Carolina is available, it is clear that the judgment before this Court on this petition is a final judgment within the meaning of and reviewable under Title 28, Section 1257 (3) of the United States Code. The fact that the highest court of the State may reconsider or review its own judgment does not alter the circumstance that a judgment which finally decides and determines the rights of the litigants is reviewable by this Court. Such a judgment is final for the purposes of Section 1257 (3) so long as it is 'subject to no further review or correction in any other State tribunal . . . finality is not deterred by the existence of a latent power in the rendering Court to reopen or revise its judgment.' *Market St. R. Co. v. Railroad Commission of California*, 324 U. S. 548, 551 (Emphasis added); *Southern Railway Co. v. Clift*, 260 U. S. 316; *Rio Grande Western R. Co. v. Stringham*, 239 U. S. 44; see also *Largent v. Texas*, 318 U. S. 418, 421-422.

"Petitioners call to the attention of the Court the fact that the Order of Mr. Chief Justice VINSON herein, dated January 31, 1950, extending their time to file their petition for writ of certiorari was upon an application for an extension of time to file such a petition to the Supreme Court of North Carolina and/or the Superior Court of Pitt County. Consequently, while it may appear that the Supreme Court of North Carolina has passed upon the merits of the Federal questions here involved and that, therefore, those questions are before this Court upon the instant petition for a writ of certiorari to the North Carolina Supreme Court, in the event that this Court concludes that the Supreme Court of North Carolina declined to review and did not review those Federal questions upon the merits, then the judgment of the Superior Court on the merits of the Federal questions here involved should be deem-

ed to be before this Court as the 'judgment rendered by the highest court of a State in which a decision could be had' (28 U. S. C. A. § 1257) and this Court may now review that judgment of the Superior Court. *Virginia Ry. Co. v. Mullens*, 271 U. S. 220; *Norfolk, etc., Turnpike Co. v. Virginia*, 225 U. S. 264; *Western Union Tel. Co. v. Hughes*, 203 U. S. 505."

"\*The Supreme Court of North Carolina in denying the application for writ of error *coram nobis* stated that 'their petition does not make *prima facie* showing of substance which is necessary to bring themselves within the purview of the writ'."

It is clear, therefore, that both positions were before this Court at that time and also because the dissenting Circuit Judge, in his opinion, seems to think that this Court relied heavily on our statement. The statement was made in good faith, but subsequently proved to be wrong because the Supreme Court of North Carolina dismissed a second application for a writ of error *coram nobis* filed by petitioners upon the ground that no substantial showing had been made which entitled petitioners to such relief. We, of course, do not know why this Court denied *certiorari* at that time, but we thought we would lay before this Court the whole story on this point.

# I.

PETITIONERS HAVE FAILED TO EXHAUST AVAILABLE REMEDIES IN THE STATE COURTS AS REQUIRED BY 28 U.S.C. § 2254, BY FAILURE TO PERFECT THEIR APPEAL TO THE SUPREME COURT OF THE STATE WHICH COULD HAVE REVIEWED ALL CONSTITUTIONAL ISSUES RAISED BY PETITIONERS IN THEIR TRIAL AND BY FAILURE TO APPLY TO THE UNITED STATES SUPREME COURT FOR CERTORARI AFTER DISMISSAL OF SECOND APPLICATION FOR CORAM NOBIS, CANNOT NOW USE THE PROCESS OF HABEAS CORPUS AS A COLLATERAL ATTACK ON THE STATE TRIAL OR AS A SUBSTITUTE FOR AN APPEAL.

We quote 28 U.S.C., § 2254, as follows:

"An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

Petitioners failed to serve statement of case on appeal within the time required by State law, and the trial judge struck out the case on appeal by order after hearing. (See Order, appellee's brief C.C.A. 4, App., p. 99.) See *STATE v. DANIELS*, 231 N. C. 17, 56 S.E. (2d) 2. In North Carolina, petitioners had an unconditional right (§ 15-180 of the General Statutes) to appeal to the Supreme Court. The Supreme Court of North Carolina reviews constitutional questions relating to racial discrimination in the composition of grand juries and petit juries (*STATE v. SPELLER*, 229 N. C. 47, S.E. (2d) 537; *STATE v. PEOPLES*, 131 N. C. 784, 42 S.E. 814) and issues as to the constitutionality of the admission of confessions (*STATE v. BROWN*, 231 N. C. 152, 56 S.E. (2d) 441; *STATE v. BROWN*, 233 N. C. 202, 63 S.E. (2d) 99) are passed on by the Supreme Court. For other State cases on jury discrimination and confessions, see appellee's brief C.C.A. 4, No. 6330, p. 10. Petitioners' remedy by appeal was adequate, and petitioners' counsel—who were also counsel for Speller and obtained two new trials in that case—knew how to perfect appeals to the Supreme Court of North Carolina. See *STATE v. SPELLER*, 229, N. C. 67, 47 S.E. (2d) 537; *STATE v. SPELLER*, 230 N. C. 345, 53 S.E. (2d) 294.

It is admitted that there have been cases of exceptional circumstances of peculiar urgency (*MOORE v. DEMPSEY*, 261 U. S. 86, 67 L.ed 543) where adequate process existed but was ineffective to protect the rights of prisoners. The

Right of appeal—no matter how adequate and comprehensive the scope of review—would be a legal chimera without the guiding hand of counsel (*WILLIAMS v. KAISER*, 323 U. S. 471, 89 L.ed. 398) to render the appeal effective. None of these exceptions exists in the present case unless the principle is adopted that exceptional circumstances exist justifying the issuance of habeas corpus in all cases of prisoners sentenced to death. We do not believe such a rule exists, but if it does, then such logic approaches the limits of Federal review of all cases where persons are sentenced to death in State Courts.

Petitioners contend that "there is presently not available to petitioners any remedy or procedure in the aforesaid state courts," and they are, therefore, entitled to relief in the Federal Courts. In other words, any petitioner, where he has available an adequate review upon conditions fixed by the State, can fail to meet these conditions or simply wait until time limitations expire and then say his present status as to exhaustion of remedies must prevail. He need not go to the trouble and expense of an available appeal; all he has to do is to fail to perfect the appeal for any reason. It is true that petitioners were only one day late in serving statement of case on appeal, but the time element does not answer the question. The State fixes the same appeal procedure for all people of all races, and the fact that petitioners belong to the colored race does not give them preferential treatment in appeals or discriminations in their favor. The time factor in perfecting appeals in nearly all States is a fixed measure and is not governed by approximations or a process of relativity. To adopt the "presently available remedy" theory of counsel for petitioners would completely destroy Title 28, U.S.C., § 2254, and would be an evasion of its plain words.

After this Court denied *certiorari* (October Term, 1949—No. 412, Misc.), petitioners applied to the Supreme Court of North Carolina for another writ of error *coram nobis* (*STATE v. DANIELS*, 232 N. C. 196, 59 S.E. (2d) 430) which was dismissed. The petitioners should then have applied to this Court for a *certiorari*, and this is another



instance of failing to exhaust an available remedy. If application had been made to this Court for *certiorari*, then irrespective of a decision on a non-Federal question—it being then known that *coram nobis* was not available—this Court would have had an opportunity to say whether or not North Carolina had furnished petitioners sufficient effective process. This fact was noted by the Circuit Court of Appeals (DANIELS v. ALLEN, No. 6330, C.C.A. 4, ..... F. (2d) ..... ) for the opinion states: "No application for *certiorari* was made to the Supreme Court of the United States to review this decision" (second *coram nobis* decision). In a footnote to this opinion (C.C.A. 4), the Court said:

"It (Supreme Court of North Carolina) had before it the fact that the question (jury discrimination) had been raised in this case; for the record shows that the case on appeal which had been stricken by the trial judge was attached to the application made for *certiorari* to bring it up as a part of the record."

While it is stated in the opinion of the Court below (C.C.A. 4) that the question is not one of exhausting State remedies as a prerequisite to the writ, but it is the use of *habeas corpus* in lieu of an appeal; it is pointed out that to allow such a substitute of an appeal would permit a lower Federal Court to review decisions of a State Court of coordinate jurisdiction instead of requiring the orderly process of appeal to the Supreme Court of the State with application to the Supreme Court of the United States for *certiorari* be followed. The right of review was provided by State practice and was lost by failure to comply with the reasonable rules of the State Court, which cannot be invalidated or waived by the Federal Courts.

The quotation of petitioners on p. 45 of their brief from MOONEY v. HOLOHAN, 294 U.S. 103, 79 L. ed. 791, is perverted by petitioners into a misleading conclusion. Petitioners are trying to make good the proposition that "the exhaustion requirement applies only to those remedies available at the time the petition for Federal *habeas corpus* is filed." They lift out of context the statement of this

Court in the MOONEY case that before Federal *habeas corpus* can issue, "recourse should be had to whatever judicial remedy afforded by the State may still remain open." When we look at the case, we find that Mooney alleged a conviction in a State Court on perjured evidence known to be so by the prosecuting officers. The State had corrective process by State *habeas corpus* which permitted the examination of constitutional questions. Mooney had not sought this State writ on these precise grounds, and it was still open to him. Up to that time, Mooney had availed himself of all State remedies except this one—he did not fail to perfect his appeal to the Supreme Court of California—and thus we see petitioners' argument fails; the "may still remain open" was applicable to a remedy still in existence, and the case is authority for our position.

The petitioners quote from (petitioners' brief, p. 34) and rely upon an article in Harvard Law Review (61 Harvard Law Review 657—The Freedom Writ). As to exhaustion of remedies, we desire to rely upon the same article, and we quote (p. 666):

"'Exhaustion' may, however, connote a more extreme requirement than that of no other presently available remedy. It may mean that federal habeas corpus is not to issue unless the petitioner invoked within the proper time every remedy which was ever available to him, even though such untried remedies are no longer available. This application of the exhaustion principle may find justification in the theory that there has been no Fifth or Fourteenth Amendment due process denial when available federal or state processes were not invoked. There are court indications that 'exhaustion' has the extreme meaning here suggested. In the Sunal case (Sunal v. Large, 332 U. S. 174, 91 L. ed. 1982), the court discussion of 'exceptional circumstances' indicated that its normal exhaustion rule would not permit federal habeas corpus where appeal had not been sought, though appeal was no longer available." (Parenthetical matter ours—footnotes not quoted)

It appears that Title 28, U.S.C., § 2254 is but a statutory expression of the rationale of previously decided cases on

this subject. Judge Parker who wrote the opinion of the Court below, and who also served as Chairman of the Judicial Conference Committee on Habeas Corpus Procedure, in an Article (Limiting the Abuse of Habeas Corpus, 8 F.R.D. 171) states:

"The provisions of the Revised Code with respect to Habeas Corpus are very largely a mere codification of the best practice already worked out by Court decisions."

Title 28, U.S.C., § 2254 became effective June 25, 1948; the case of *YOUNG v. RAGEN*, 337 U.S. 235, 93 L. ed. 1333, was decided June 6, 1949, and this Court in footnote 1 states:

"Existing law as declared by *Ex Parte Hawk* was made a part of the statute by the new judicial code 28 U.S.C. 1948 ed. Sec. 2254 \* \* \*."

This point—failure to exhaust an adequate appeal—has been already decided against petitioners:

*SUNAL v. LARGE*, 332 U. S. 174, 91 L. ed. 1982  
*RIDDLE v. DYCHE*, 262 U. S. 333, 67 L. ed. 1009  
*EX PARTE HAWK*, 321 U. S. 114, 88 L. ed. 572  
*GLASGLOW v. MOYER*, 225 U. S. 420, 56 L. ed. 1147  
*WOOLSEY v. BEST*, 299 U. S. 1, 81 L. ed. 3  
*YOUNG v. RAGEN*, 337 U. S. 235, 93 L. ed. 1333  
*GOTO v. LANE*, 265 U. S. 393, 68 L. ed. 1070  
 See cases cited Brief p. 11, C.G.A. 4, No. 6330.

In the case of *GOTO v. LANE*, 265 U. S. 393, 68 L. ed. 1070, the Court had before it an appeal from a judgment of the District Court of Hawaii refusing a writ of *habeas corpus* sought by thirteen persons convicted in a territorial Circuit Court. They attempted to raise certain constitutional questions about the indictment and other particulars. It appeared, however, that the petitioners could have sought a review on a writ of error and could have had these same questions reviewed by an appellate Court but that they allowed their time to expire and thereby lost the opportunity to resort to this remedy. In disposing of the

question and affirming the dismissal of the *habeas corpus*, the Supreme Court of the United State said:

"This case does not measure up to that test. The circuit court in which the petitioners were tried and convicted undoubtedly had jurisdiction of the subject matter and of their persons, and the sentence imposed was not in excess of its power. The offense charged was neither colorless nor an impossible one under the law. The construction to be put on the indictment, its sufficiency, and the effect to be given to the stipulation, were all matters the determination of which rested primarily with that court. If it erred in determining them, its judgment was not, for that reason, void (*Ex parte Watkins*, 3 Pet. 193, 203, 7 L. ed. 650 653; *Ex parte Parks*, 93 U. S. 18, 20, 23 L. ed. 787, 788; *Ex parte Yarbrough*, 110 U. S. 651, 654, 28 L. ed. 274, 275, 4 Sup. Ct. Rep. 152), but subject to correction in regular course on writ of error. *If the questions presented involved the application of constitutional principles, that alone did not alter the rule.* *Markuson v. Boucher*, 175 U. S. 184, 44 L. ed. 124, 20 Sup. Ct. Rep. 76. *And if the petitioners permitted the time within which a review on writ of error might be obtained to elapse, and thereby lost the opportunity for such a review, that gave no right to resort to habeas corpus as a substitute.* *Riddle v. Dyche*, 262 U. S. 333, 67 L. ed. 1009, 43 Sup. Ct. Rep. 555. And see *Craig v. Hecht*, 263 U. S. 255, ante, 293, 44 Sup. Ct. Rep. 103." (Emphasis supplied)

The case of *GOTO v. LANE*, *supra*, has been cited and approved various times by the Supreme Court of the United States, the latest reference appearing in the case of *SUNAL v. LARGE*, 332 U. S. 174, 91 L. ed. 1982. The case is also approved by a Circuit Court of Appeals in the case of *BIDDLE v. HAYES*, 8 Cir., 8 Fed. (2d) 937. The same case has also been approved in the case of *U. S. EX REL. GEISE v. CHAMBERLAIN*, 7 Cir., 184 Fed. (2d) 404. (Adv. Op. No. 4 in Federal Report).

We will quote from a few of these cases decided by Circuit Courts of Appeal in order to show the Court that the rule followed by the various Courts of Appeal is the same rule followed by the case of *GOTO v. LANE*, *supra*, in the Supreme Court of the United State.



In the case of *WASHINGTON v. SMYTH*, 4 Cir., 167 Fed. (2d) 659, the Court said:

"Petitioner is now being held in the Virginia State Penitentiary as a result of two convictions in the Corporation Court of the City of Newport News, Virginia. No attempt has been made by petitioner to secure a writ of habeas corpus from any court of the State of Virginia.

"It has frequently been held that the availability of the writ of habeas corpus in a federal court on behalf of one held in the custody of a State depends upon the exhaustion of State remedies when these are adequate and available. *White v. Ragen*, 324 U. S., 760, 65 S. Ct. 978, 89 L. ed. 1348; *Mooney v. Holohan*, 294 U. S. 103, 55 S. Ct. 340, 79 L. ed. 791, 98 A.L.R. 406."

In the case of *U. S. EX REL. CARR v. MARTIN* 2, Cir., 172 Fed. (2d) 519, 520, the Court said:

"It appears, however, that in 1947 his conviction in Pennsylvania was reviewed in the courts of that state upon his application for a writ of error coram nobis and that when relief was denied he took no appeal, though he unsuccessfully applied for leave to appeal as a poor person. Moreover, there is no showing that he took any appeal from his original conviction in Pennsylvania: \* \* \*

"The district court had no jurisdiction to sit in review of claimed errors in the state courts. The relator's remedy was by appeal in the state courts, and his application to the court below for a writ of habeas corpus is not a substitute for that remedy."

In the case of *McGUIRE v. HUNTER*, 10 Cir., 138 Fed. (2d) 379, the petitioners' attorney failed to perfect their appeal, and it was held that this was not grounds for the issuance of a writ of *habeas corpus*. The Court, in its opinion on this point, said:

"As a further ground for the issuance of the writ, it is contended that petitioner instructed his attorney to appeal the criminal case and that he failed to do so. But an appeal is not a necessary element of due process, and it is not incumbent upon the trial court in a criminal case to see that the attorney for the defendant perfects an appeal. *Therefore the failure of*

*the attorney in this instance to take the requisite steps to appeal the case does not warrant the discharge of petitioner on habeas corpus.* Errington v. Hudspeth, 10 Cir., 110 F.2d 384, 127 A.L.R. 1467; McDonald v. Hudspeth, 10 Cir., 129 F.2d 196." (Emphasis supplied)

In the case of SCHECHTMAN v. FOSTER, 2 Cir., 172 Fed. (2d) 339, the petitioner had been denied leave to appeal in forma pauperis and did not press his appeal to a conclusion, and it was held that he was not entitled to *habeas corpus*, and on this point, the Court said:

"This is not, however, the full measure of the obstacles which stood in the path of *habeas corpus* in the District Court, because, although no right of appeal was necessary, since there was one, it was necessary that Schechtman before resorting to a federal court should exhaust all his remedies in the state court, including the right of appeal which did exist in 1948. Although he did invoke that right, *he did not press it to a conclusion*; so that, *prima facie*, he did not exhaust his remedies. His excuse is that the Appellate Division denied him leave to proceed in forma pauperis; but he must show that the denial was itself a denial of due process of law. This he has not done. We do not know why the Appellate Division denied leave. It may have been because they did not think that he had made an adequate showing of his poverty; it may have been because they themselves examined the evidence which he had presented to the trial court, and satisfied themselves that there was no reasonable chance of his success, because it did not make out a *prima facie* case of the deliberate use of perjured testimony." (Emphasis supplied)

In the case of U. S. EX REL. STEELE v. JACKSON, 2 Cir., 171 Fed. (2d) 432, 433, the Court said:

"But if the facts, on which the relator relies to show the subornation of witnesses, came to his knowledge too late to be used by the statutory remedies, the decision was apparently wrong, *pro tanto*. Even so, his relief was by appeal from the order; and he may not apply to a federal court as a substitute for such an appeal. Moreover, he may not do so, if he did appeal and was unsuccessful; for district courts do not sit to review errors which state courts, high or low, may

make in the administration of their own remedies provided those remedies gives 'due process of law.' The possibility that any court in any country may be mistaken is part of the burden of the administration of justice; there must be an end to the hierarchy of appeals."

In the case of *BERKOFF v. HUMPHREY*, 8 Cir., 159 Fed. (2d) 5, 7, the Court said:

"A defendant must follow the regular course of criminal proceedings and exhaust the ordinary remedies afforded him before he may resort to habeas corpus, even though he attacks the constitutionality of the statute under which he was indicted. *Johnson v. Hoy*, 227 U. S. 245, 247, 33 S.Ct. 240, 57 L. Ed. 497; *Glasgow v. Moyer*, 225 U. S. 420, 428, 429, 32 S.Ct. 753, 56 L. Ed. 1147. The hearing on habeas corpus is not in the nature of an appeal nor is it a substitute for the functions of the trial court. This is true as to controverted issues of fact and as to disputed issues of law 'whether they relate to the sufficiency of the indictment or the validity of the statute on which the charge is based. These and all other controverted matters of law and fact are for the determination of the trial court.' *Henry v. Henkel*, 235 U. S. 219, 229, 35 S.Ct. 54, 57, 59 L. Ed. 203. 'It is fundamental that a court upon which is conferred jurisdiction to try an offense has jurisdiction to determine whether or not that offense is charge or proved. Otherwise every judgment of conviction would be subject to collateral attack and review on habeas corpus on the ground that no offense was charged or proved.' *Knewel v. Egan*, 268 U. S. 442, 446, 45 S.Ct. 522, 524, 69 L. Ed. 1036."

In the case of *SCHLDER v. GUSIK*, 6 Cir., 180 Fed. (2d) 662, 775; the Court said:

"Finally, the appellee urges that we may not consider the question of exhaustion of remedies because that issue was not raised either in the pleading or upon hearing below. We reject the argument. Exhaustion of remedies, while not precisely jurisdictional to the consideration of a petition for habeas corpus, nevertheless involves a concept of broad judicial policy stemming from the concern of federal courts to preserve the delicate balance of authority between the state and federal judiciary; between courts and administrative

agencies, and between civil and military courts. So viewing it we think reviewing courts are required to apply the doctrine of exhaustion of remedies whether an issue in respect to it was raised below or not. Only so may there be consistency of decision and the balance of authority maintained."

In the case of *U. S. EX REL. RHEIM v. FOSTER*, 2 Cir., 175 Fed. (2d) 772, 773; the Court said:

"An examination of the record has convinced each of us that application for a certificate of probable cause should be denied. The applicant was convicted in 1928 of murder in the second degree. He was represented in that trial by competent counsel. The errors therein which he now asserts do not appear to be such as deprived him of any constitutional right but; if they did, his remedy was by appeal from the judgment of conviction. Failure to avail himself of that remedy precludes resort to habeas corpus in a federal court, in the absence of exceptional circumstances, which are not shown in the present case. 28 U.S.C.A. § 2254. The same is true with respect to the state Court's denial of his coram nobis proceeding; and the fact that poverty has precluded prosecuting an appeal from that order does not enlarge his right to a federal habeas corpus. *United States v. Tyler*, 269 U. S. 13, 19, 46 S.Ct. 1, 70 L.Ed. 138."

In the case of *NESBIT v. HERT*, D.C. Indiana, 91 Fed. Rep. 123, 125, 126, the Court said:

"If the petitioner has neglected to appeal to the supreme court of the state for relief from the alleged wrongful sentence, until he has lost the right to take such appeal, he is in no situation to invoke the aid of this court to relieve him from the consequences of his negligence."

See also:

*DARR v. BURFORD*, 339 U. S. 200, 94 L. ed. 761

Annotation: 94 L. ed. 785

*SANDERLIN v. SMYTH*, 138 F. (2d) 729, 730 (C.C.A. 4)

*U. S. EX REL. FEELEY v. RAGEN*, 166 F. (2d) 976, 981 (C.C.A. 7)

*MARKUSON v. BOUCHER*, 175 U. S. 184, 185



Finally, it is contended by petitioners that they attempted to appeal, and, therefore, they have met the conditions of the statute (Title 28, U.S.C., §. 2254) and have exhausted their remedy of appeal. There is implicit in this contention a claim of substantial compliance. This is a bizzare and strange contention in view of the language of the statute. The language is written in the past tense "has exhausted," which contemplates completed action. The concept of "exhaustion" is "to bring out or develop completely." The fact remains that the statute does not deal with approximations or attempts. The statute itself is a full answer to such a contention.

We assert that since the enactment of Title 28, U.S.C., § 2254, petitioners have no standing in the Federal Courts on *habeas corpus* unless State appeal is exhausted or unusual circumstances of peculiar urgency are shown.

The cases cited by petitioners as justifying *habeas corpus* without exhaustion of appellate remedies are either cases that originated in the Federal Courts or the Court originally had no jurisdiction over the person or subjectmatter, or exceeded its authority in rendering judgment.

The case of *EX PARTE LANGE*, 85 U. S. 163, 21 L. ed. 872, came to this Court on *habeas corpus* and *certiorari*. The prisoner having complied with one judgment, the lower Court had no right to strike it out and impose another judgment.

The case of *IN RE SNOW*, 120 U. S. 274, 30 L. ed. 658, the want of jurisdiction appeared on the face of the record, and under the Federal statute, the defendant had a right to appeal upon refusal to issue *habeas corpus*. This case arose in a lower Federal Court.

The case of *EX PARTE WILSON*, 114 U. S. 417, 29 L. ed. 89, arose in lower Federal Court, decided that the writ should issue because prisoner had been tried and sentenced for an infamous offense with indictment or presentment of Grand Jury which deprived the Court of jurisdiction.

The case of *EX PARTE BAIN*, 121 U. S. 1, 30 L. ed. 849, arose in a lower Federal Court, and it was decided the

Court had no jurisdiction because an amendment to the indictment had not been re-submitted to the Grand Jury.

In the case of *CALLAN v. WILSON*, 127 U. S. 540, 32 L. ed. 223, the petitioner was deprived of a jury trial in the Police Court of the District of Columbia. This case came to this Court on an appeal, and procedural questions as to *habeas corpus* were not discussed.

In the case of *JOHNSTON v. ZERBST*, 304 U. S. 458, 82 L. ed. 1461, the prisoner was convicted in the District Court of the United States, and it was decided that he had not waived his right to counsel, and assistance of counsel being a constitutional requirement in the Federal Court, the same was reviewable by *habeas corpus*. The case was decided in 1938, and there was no statute saying that appellate remedies must be exhausted as there is now applicable to State trials. The same is true as to the case of *WALKER v. JOHNSTON*, 312 U. S. 275, 85 L. ed. 830, which was a case of deprivation of counsel. In *WAILEY v. JOHNSTON*, 316 U. S. 101, 86 L. ed. 1302, the case arose in the Federal Court and it appeared that the prisoner had entered a plea of guilty because of coercion by a F.B.I. agent. The government confessed error. The case of *BOWEN v. JOHNSTON*, 306 U. S. 19, 83 L. ed. 455 involved the jurisdiction of the State Court and Federal Court as to national park lands. It was decided on the principle of exceptional circumstances.

The case of *U. S. EX REL. AULD v. WARDEN OF NEW JERSEY STATE PENITENTIARY*, 187 F. (2d) 615 is greatly relied upon by petitioners. This case does state that a sentence of death plus the absence of the right to review by *habeas corpus* in the New Jersey Courts would constitute extraordinary circumstances, and the writer of the opinion further states that there are decisions of this Court to sustain his view, but he does not cite the cases. This discussion is plainly collateral to the primary point in the case because the Court disposed of the case on the merits and decided that Auld was not entitled to the writ of *habeas corpus*. The concurring opinion of Circuit Judge Hastie calls attention to the fact that there was no need

of passing upon the problem of extraordinary circumstances.

## II.

THE CONSTITUTIONAL ISSUE AS TO THE RACIAL EXCLUSION OF NEGROES FROM THE GRAND JURY AND PETIT JURY WAS DETERMINED ADVERSELY TO PETITIONERS IN THEIR STATE COURT TRIAL AND THIS ISSUE CANNOT BE RETRIED OR COLLATERALLY ATTACKED IN A HABEAS CORPUS PROCEEDING.

After petitioners had been arraigned and entered pleas of not guilty and after counsel appointed by the Court to defend petitioners, and petitioners were represented by counsel of their own choosing, a motion to quash the bill of indictment for racial exclusion of colored people from the Grand Jury and a challenge to the array as to the Petit Jury were entered. (S.Tr. Vol. 1, p. 167—evidence on these motions, S.Tr. Vol. 1, pp. 2-167) Counsel appointed by the Court to defend petitioners were Mr. W. W. Speight and Mr. Arthur Corey. Mr. Speight was an experienced criminal lawyer, with a period of legal experience in the office of the Attorney General of the State. Mr. Arthur Corey was a skilled trial lawyer who had served several terms in the General Assembly of the State, and he had made many political campaigns all over Pitt County. He probably knew more people in the County than any other attorney. These lawyers did not think that it was to the best interest of their clients to attempt to quash the bill of indictment or challenge the array of the trial panel, in other words, they thought it was to the best interest of their clients not to raise the racial question. (See evidence of W. W. Speight, F.Tr. pp. 51-54—appendix to appelle's brief, C.C.A. 4, No. 6330, pp. 46-48.) Under the North Carolina practice (STATE v. BURNETTE, 142 N. C. 577, 55 S.E. 72; STATE v. BEAL, 199 N. C. 278, 294, 154 S.E. 604, 613; STATE v. BREWER, 180 N. C. 716, 717, 104 S.E. 655, 656), a motion to quash a bill of indictment must be entered before the persons indicted plead to the bill of indictment. If such a

motion is made after plea and arraignment, the allowance of the motion is in the discretion of the Court. The trial Court passed on these motions by considering the merits as shown by the evidence and also relied on the local practice to the effect that he had a discretion in the matter where the motion was made after arraignment, and basing his ruling on both grounds—merits and discretion—these motions of the petitioners were overruled. (S.Tr. Vol. 1, p. 167; trial Court's findings of fact on motions, S.Tr. Vol. 4, pp. 1-22—appendix to appellee's brief, C.C.A. 4, No. 6330, p. 125)

We think that in passing on this matter where collateral attack is made by the *habeas corpus* process, this Court should, to a large extent, view the matter from the standpoint of the State trial judge and the evidence before him. At the hearing before the district judge on *habeas corpus*, petitioners presented a considerable volume of evidence as to the sources of the members of the juries and as to the selection of the jury that was never presented before the State trial judge. If the Court will examine the transcript of evidence showing the proceedings at the State trial, the Court will see that the petitioners attacked the jury organization by showing the ratio between the racial population and by placing on the witness stand many colored witnesses who testified to facts tending to establish eligibility for jury duty and who further testified they had never served on any jury. The State likewise placed on the witness stand many white witnesses who testified that they were in the same situation.

The statutes governing the selection of jurors, both for Grand Jury and Petit Jury service, appear in the appendix, and it appears from the transcript that the petitioners did not contend in their motions that these jury statutes were, within themselves, unconstitutional but that petitioners contended that the statutes had been administered in such a manner as to result in an unconstitutional racial discrimination. (S.Tr. Vol. 4, p. 4)

The population of Pitt County appears to be 61,244 persons, of which 32,151 belong to the white race, and 29,086



belong to the Negro race. The evidence justifies the estimate, as found by the Court, that 17,323 persons of the white race were over twenty-one years of age, that 13,762 of the Negro race were over twenty-one years of age.

In the year of 1946, the total persons on the tax list were 15,517. Of these, 10,344 were white persons, and 5,173 were colored. This list is the list that would be used for the year of 1947. The total listed for taxes in 1945 was 14,368, and of this, 9,466 were of the white race, and 4,902 of the colored race. For the year of 1947, there was a total of 16,455, of which 10,894 belonged to the white race, and 5,561 belonged to the colored race. For the year of 1948, there was a total of 16,926, of which 11,193 belonged to the white race, and 5,733 belonged to the colored race. The Court will find the tabulation for the various years as to the tax list in S.Tr. Vol. 4, pp. 141, 142.

It was admitted by both the petitioners and the State that the jury boxes for the County contained the names of approximately 10,000 persons of both the white and Negro race. It was further found as a fact by the Court (S.Tr. Vol. 4, p. 5) that prior to the year of 1947, no Negro had served on the Grand Jury in the Superior Court of Pitt County in more than twenty years but that prior to 1947, members of the Negro race were occasionally called and served on the jury.

In 1947, the jury boxes of Pitt County were purged, and all names of jurors appearing on the scrolls were destroyed. A new list of names was prepared, both from the tax list and from other sources, and the evidence shows that there was nothing appearing on these lists to indicate whether a person was of the white or Negro race, although there was much evidence taken as to certain red marks appearing on some scrolls. The examination of the members of the Board of County Commissioners who are charged with constituting the jury box begins on S.Tr. Vol. 1, p. 112, and the Court will see that the red marks were explained and that they have no reference to race, dealing largely with changes of residence, deaths, etc.

When the June meeting was held of the Board of County

Commissioners for the purpose of purging the jury box, the County Attorney met with the Board of Commissioners and advised the Board that both under decisions of the State Supreme Court and of the Supreme Court of the United States, eligible Negroes could not be excluded from the jury list, (S.Tr. Vol. 1, pp. 122, 123) and that the list of names was composed of the tax list and from names of persons registered to vote in the various townships. The Commissioners also made investigations, each one in his own township.

The members of the Board of Commissioners, the Clerk to the Board of Commissioners, and all persons having anything to do with the jury list testified fully as to how the jury list was made up and how the jurors were selected. The Court will find this in S.Tr. Vol. 1, p. 112, et seq.

A public-local act is applicable to Pitt County whereby the membership of the Grand Jury is staggered so that nine members are chosen after the first days of January and July of each year to serve for a term of one year. This public-local act appears in S.Tr. Vol. 4, p. 15. It will thus be seen that although the Grand Jury which indicted the petitioners did not contain any colored persons, nine names were drawn according to the statute and from a box that contained the names of both white and colored. All names were drawn from the whole panel of jurors by a child under ten years of age as required by the statute. (S.Tr. Vol. 4, p. 16) It was furthermore found by the Court as a fact, and the evidence supports the finding, that members of the Negro race have been drawn for jury duty at practically every term of the Superior Court since the box was purged in July, 1947. (S.Tr. Vol. 4, p. 17) A venire of 150 jurors was ordered by the Court for the trial of this case for the purpose of supplementing the panel of regular jurors. Of these names drawn, five members were of the Negro race, and out of the total number of persons actually summoned by the Sheriff, two were Negroes, and of these two, one served upon the jury which tried these petitioners. (S.Tr. Vol. 4, p. 17)

In S.Tr. Vol. 1, pp. 72, 73, there will be found a list con-

taining the number of jurors summoned for jury duty from August, 1945, on through the May Term, 1947. The Clerk to the Board of Commissioners also appended an affidavit (S.Tr. Vol. 1, p. 73) showing the number of Negroes who were drawn for jury duty at each term. It should be carefully noted that there might have been more Negroes drawn at all of these terms, but from his knowledge, not less than the number set forth was drawn.

Both the petitioners and the State offered as witnesses several persons from each race who testified that they had never served on any jury in Pitt County although they were apparently eligible. It will be seen that a great many of these persons were ministers or undertakers, and by reason of their occupation were automatically excused from jury duty by the statute. A copy of the statute appears in the appendix. The testimony as to the white persons who have never served on a jury in the county begins in S.Tr. Vol. 1, p. 74, et seq.

It is not denied that under the Fourteenth Amendment, the eligible citizens of petitioners' race are entitled to their chance to serve on the various juries and cannot be deprived of this chance by design. But fairness in selection does not require a guaranteed, proportional representation of the petitioners' race on every jury selected and constituted.

AKINS v. TEXAS, 324 U. S. 398, 89 L. ed. 1692

THOMAS v. TEXAS, 212 U. S. 278, 53 L. ed. 512

VIRGINIA v. RIVES, 100 U. S. 313, 25 L. ed. 667

SWAIN v. STATE, 215 Ind. 259, 18 N. E. (2d) 921, 926

ZIMMERMAN v STATE, ... Md. ...., 59 A. (2d) 675

CERTIORARI DENIED, 93 L. ed. (Ad. Op. No. 7).

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16 C.J.S. (Constitutional Law), Sec. 540

The type of discrimination condemned is said to be "purposeful discrimination" (AKINS v. TEXAS, 325 U. S. 398, 89 L. ed. 1692), or a "long-continued, unvarying, and wholesale exclusion of Negroes from jury service" (NORRIS v. ALABAMA, 294 U. S. 587, 79 L. ed. 1074).

There is a presumption that officers in charge of jury selection have performed their duty fairly and justly (TARRENCE v. FLORIDA, 188 U. S. 519, 47 L. ed. 572, 116 So. 470 (Fla.) Certiorari denied in 278 U. S. 599, 73 L. ed. 525) and without discrimination against race or class. The burden of proof is upon petitioners to show an alleged discrimination in the selection of a grand or petit jury (AKINS v. TEXAS, 325 U. S. 398, 89 L. ed. 1692; MURRAY v. LOUISIANA, 163 U. S. 101, 41 L. ed. 87).

In AKINS v. TEXAS, 325 U. S. 398, 89 L. ed. 1692, the Court uses the words "purposeful discrimination." In NORRIS v. ALABAMA, 294 U. S. 587, 79 L. ed. 1074, the Court uses the words "long-continued, unvarying, and wholesale exclusion of Negroes from jury service."

It is very generally held that the burden of proof is on the defendant or defendants to show an alleged discrimination in the selection of a Grand or Petit Jury.

AKINS v. TEXAS, 325 U. S. 398, 89 L. ed. 1692  
MURRAY v. LOUISIANA, 163 U. S. 101, 41 L. ed. 87

There is a presumption that officers in charge of the selection and summoning of a jury or jury panel will be presumed to have performed their duty fairly and justly without discrimination against any race or class. In other words, discrimination in the selection of a jury will not be presumed.

TARRENCE v. FLORIDA, 188 U. S. 519, 47 L. ed. 572,  
116 So. 470 (Fla. (Certiorari denied in 278 U. S.  
599, 73 L. ed. 525).

Fairness in selection has never been held to require proportional representation of races upon a jury.

AKINS v. TEXAS, 325 U. S. 398, 89 L. ed. 1692  
VIRGINIA v. RIVES, 100 U. S. 313, 25 L. ed. 667.  
THOMAS v. TEXAS, 212 U. S. 278, 53 L. ed. 512.

A defendant has no constitutional right to be indicted or tried by any particular jury or by a jury composed in part of members of his race or class.



STATE v. PEOPLES, 131 N. C. 784, 42 S.E. 814

STATE v. SLOAN, 97 N. C. 499

STATE v. LOGAN, 341 Mo. 1164, 111 S.W. (2d) 110; 1937)

MARTIN v. TEXAS, 200 U. S. 316, 50 L. ed. 494

"It is unsafe, we think, to attach too much significance to abstract, mathematical ratios or to the so-called law of recurrences in determining whether there has been arbitrary discrimination in the selection of the juries."

SWAIN v. STATE, 215 Ind. 259, 18 N.E. (2d) 921, 926

The fact that in this case there were found separate lists with the word "colored" at the top of the page containing the list does not show discrimination.

Respondent contends, therefore, that the petitioners have not met the burden imposed upon them and as required by the principles stated in the case of FAY v. NEW YORK, 91 L. ed. 1517.

Under the North Carolina practice, the questions raised by the petitioners' motion to quash are in the first instance heard and decided by the trial Court. The trial Court makes findings of fact; and in the absence of an abuse of discretion or in the absence of lack of evidence to support findings, such decision of the trial Court is ordinarily binding upon the Supreme Court. This practice is illustrated by the following cases:

STATE v. HENDERSON, 216 N. C. 99, 3 S.E. (2d) 357

STATE v. BELL, 212 N. C. 20, 192 S.E. 852

STATE v. WALLS, 211 N. C. 487, 191 S.E. 232

STATE v. COOPER, 205 N. C. 657, 172, S.E. 199

STATE v. LORD, 225 N. C. 354, 34 S.E. (2d) 205

Respondent contends, therefore, that the Board of Commissioners of Pitt County, upon the advice of the County Attorney, purged the jury box in 1947 and Negroes have been serving on trial juries since that time, *one Negro serving on the jury that heard this case*. The fact that no Negroes appeared on the Grand Jury is not strange in view of the system of drawing nine Grand Jurors at a time under the system prevailing in Pitt County.

The whole situation as to the facts before the trial judge appears in his findings of fact on this issue which appear both in the State transcript and in the appendix of appellee's brief filed in the Circuit Court of Appeals for the Fourth Circuit. We have gone into the merits of the matter because the district judge passed upon the merits as will be seen from his findings of fact which appear in the record of the Circuit Court of Appeals. As to the evidence developed by petitioners in the hearing before the district judge on jury discrimination, we do not believe that the writ of *habeas corpus* can be used to amplify the record (KELLEY v. RAGEN, 129 F. (2d) 811, 813, C.C.A. 7) by bringing in newly discovered evidence nor can the writ of *habeas corpus* be used to enlarge the record and show additional grounds of defense. (JOHNSON v. HOY, 227 U. S. 245, 57 L. ed. 497; U. S. v. MULLIGAN, 67 F. (2d) 321, 323, C.C.A. 2)

*Jury Discrimination in a State Trial with State  
Decision Thereon is not Subject to Retrial in  
Federal Court on Habeas Corpus.*

The Superior Court of Pitt County is a Court of general jurisdiction (G. S. 7-63), and the Court had jurisdiction to try persons charged with murder as defined (G. S. 14-17) by the State statute. The constitutional issues as to jury discrimination having been raised and decided in the State trial are not subject to collateral attack in the Federal Court on *habeas corpus*. The criminal procedure of this State provided for an appeal to the Supreme Court of North Carolina to review these constitutional issues on jury discrimination, both as to Grand Jury and Petit Jury. (STATE v. SPELLER, 222 N. C. 67, 47, S.E. (2d) 537) In support of our position that racial discrimination in the selection of jurors, both Grand and Petit Jury, is an irregularity and does not cause the State trial Court to lose jurisdiction and is not subject to collateral attack on *habeas corpus*, we cite our authorities as follows:

IN RE WOOD, 140 U. S. 278, 35 L. ed. 505

JUGIRO v. BRUSH, 140 U. S. 370, 35 L. ed. 511  
 ANDREWS v. SWARTZ, 156 U. S. 272, 39 L. ed. 422  
 KAIZO v. HENRY, 211 U. S. 146, 53 L. ed. 125  
 IN RE WILSON, 140 U. S. 575, 35 L. ed. 513  
 CARRUTHERS v. REED, 8 Cir., 102 Fed. (2d) 933  
 EX PARTE MURRAY, 66 Fed. Rep. 297  
 EX PARTE CEASAR, D.C., Texas, 27 Fed. Supp. 690  
 U. S. EX REL JACKSON v. BRADY, D.C., Md., 47  
 Fed. Supp., 362  
 JOHNSON v. WILSON, D.C., Ala., 45 Fed. Supp. 597  
 (Affirmed JOHNSON v. WILSON, 5 Cir. 131 Fed. (2d) 1)  
 STATE EX REL PASSER v. COUNTY BOARD, 52  
 A.L.R. 916 (Minn.), Note p. 929  
 HALE v. CRAWFORD, 1 Cir., 65 Fed. (2d) 739  
 EURY v. HUFF, App. D.C., 146 Fed. (2d) 17  
 SCHOLZ v. SHAUGHNESSY, App. D. C., 180 Fed.  
 (2d) 450  
 U. S. EX REL McCANN v. THOMPSON, 2 Cir., 144  
 Fed. (2d) 604

In the case of IN RE WOOD, 140 U. S. 278, 35 L. ed. 505,  
 the Court said:

"If the question of the exclusion of citizens of the African race from the lists of grand and petit jurors had been made during the trial in the Court of General Sessions, and erroneously decided against the appellant, such error in decision would not have made the judgment of conviction void, or his detention under it illegal. SAVIN, PETITIONER, 131 U. S. 267, 279; STEVENS v. FULLER, 136 U. S. 468, 478. Nor would that error, of itself, have authorized the Circuit Court of the United States, upon writ of habeas corpus, to review the decision or disturb the custody of the accused by the state authorities. The remedy, in such case, for the accused, was to sue out a writ of error from this court to the highest court of the State having cognizance of the matter, whose judgment, if adverse to him in respect to any right, privilege or immunity, specially claimed under the Constitution or laws of the United States, could have been reexamined, and reversed, affirmed or modified, by this court as the law required. Rev. Stat. § 709."

In the case of *JUGIRO v. BRUSH*, 140 U. S. 370, 35 L. ed. 511, the Court said:

"The statutes of New York regulating these matters do not, in any way, conflict with the provisions of the Federal Constitution; and if, as alleged, they were so administered by the state court, in appellant's case, as to discriminate against him because of his race, the remedy for the wrong done to him was not by a writ of habeas corpus from a court of the United States."

In the case of *KAIZO v. HENRY*, 211 U. S. 146, 53 L. ed. 125, the Court said:

"These well-settled principles are decisive of the case before us. Disqualifications of grand jurors do not destroy the jurisdiction of the court in which an indictment is returned, if the court has jurisdiction of the cause and of the person, as the trial court had in this case. *Ex parte Harding*, 120 U.S. 782; *in re Wood*, 140 U. S. 278; *In re Wilson*, 140 U. S. 575. See *Matter of Moran*, 203 U. S. 96, 104. The indictment, though voidable, if the objection is seasonably taken, as it was in this case, is not void. *United States v. Gale*, 109 U. S. 65. The objection may be waived, if it is not made at all or delayed too long. This is but another form of saying that the indictment is a sufficient foundation for the jurisdiction of the court in which it is returned, if jurisdiction otherwise exists. That court has the authority to decide all questions concerning the constitution, organization and qualification of the grand jury, and if there are errors in dealing with these questions, like all other errors of law committed in the course of the proceedings, they can only be corrected by writ of error."

In the case of *ANDREWS v. SWARTZ*, 156 U. S. 272, 39 L. ed. 422, the Court said:

"Even if it be assumed that the state court improperly denied to the accused, after he had been arraigned and pleaded not guilty, the right to show by proof that persons of his race were arbitrarily excluded by the sheriff from the panel of grand or petit jurors solely because of their race, it would not follow that the court lost jurisdiction of the case within the meaning of the well-established rule that a prisoner under con-



viction and sentence of another court will not be discharged on habeas corpus unless the court that passed the sentence was so far without jurisdiction that its proceedings must be regarded as void."

In the case of CARRUTHERS v. REED, 8 Cir., 102 Fed. (2) 933, the Court said:

"Under the law of Arkansas, a challenge to the panel or motion to squash must be promptly made and it is too late if the jury has been empanelled and sworn. *Brown v. State*, 12 Ark. 623 (See 35 C.J. 377). If no objection was made at the trial, it is too late to urge it for the first time after verdict.

*"The right to challenge the panel is a right that may be waived and is waived if not seasonably presented.* Such rights, if waived during trial, may not be availed of by attack, in a collateral proceeding. *Bracey v. Zerbst*, 10 Cir., 93 F. 2d 8." (Emphasis supplied)

In GLASGOW v. MOYER, 225 U. S. 420, 429, 32 S. Ct. 753, 756, 56 L. ed. 1147, the Court, after reviewing the cases, said:

"The principle of the cases is the simply one that if a court has jurisdiction of the case, the writ of habeas corpus cannot be employed to *re-try* (italics ours) the issues, whether of law, constitutional or other, or of fact."

In the case of U. S. v BRADY, 133 Fed. (2d) 476, in passing on a State trial in the City of Baltimore, it appeared that the service file of jurors was made up of the names of 18,901 white and 653 colored persons. At the time of the trial, there were seven jury panels of 25 each in the Courts of Baltimore containing eight Negroes out of a total of 175 men. The Grand Jury had always contained one colored juror. On review, the Circuit Court of Appeals for the Fourth Circuit, Judge Soper writing for the Court, found that no discrimination existed. It should also be added that a good part of the opinion rests upon the doctrine of waiver.

## III.

THE CONSTITUTIONAL ISSUE AS TO THE VOLUNTARINESS OF PETITIONERS' CONFESSIONS. WAS HEARD AND DETERMINED BY THE STATE TRIAL COURT, AND THE RULING OF THE STATE COURT CANNOT NOW BE RETRIED OR COLATERALLY ATTACKED BY THE PROCESS OF HABEAS CORPUS.

Petitioners contend that their confessions introduced in evidence against them were obtained by coercion, force and violence contrary to the Fourteenth Amendment. (For confessions, see appendix, pp. 96, 97a appelle's brief, C.C.A. 4, No. 6330—S.Tr. Vol. 1, pp. 273 and 276.) Petitioners were arrested at different times and places and taken to Martin County for safekeeping. (See evidence of Sheriff Ruel W. Tyson, F.Tr. p. 184—appendix, p. 50, appellee's brief, C.C.A. 4—see evidence of all other officers present at arrest, Federal Transcript, evidence of respondent.) The circumstances of these arrests and the procuring of these confessions are also discussed in respondent's brief filed at October Term, 1949, No. 412, Misc., DANIELS v. NORTH CAROLINA. Petitioners, in their brief—p. 25—make the astonishing statement that they were subjected to questioning by police officers at least 42 hours in the case of Lloyd Ray Daniels and 14 hours in the case of Bennie Daniels. This is simply not true, and we invite the Court to review the records on this point. Petitioner, Bennie Daniels, himself, estimates that he was interviewed about an hour and one-half before the written confessions were signed. (See S.Tr. Vol. 1, p. 265.) Bennie Daniels claimed at the State trial that one of the officers slapped him, and when all of the officers stood up, he could not identify the officer who he contended inflicted the slap. Yet at the hearing on *habeas corpus*, almost two years later, his memory was so refreshed by the passing of time that he testified on the *habeas corpus* hearing (F.Tr. p. 164) that Chief Page was the man who struck him. Yet he denied that Chief Page was the man on the State trial. Lloyd Ray

Daniels contended on the *habeas corpus* hearing that when he was in the jail at Williamston, he asked to see his mother. This is an after-thought for on the State trial, he never gave any evidence to this effect. The truth is that the petitioners never, at any time, asked to see any attorney or friends. When Bennie Daniels was arrested, the sheriff took him by his father's home and told his relatives that Bennie was under arrest. (See F.Tr. p. 192.) The arrests were made without warrants because the officers had information that there were bloody clothes at the home of Lloyd Ray Daniels and that one of the petitioners had sent word to this home to burn or destroy these clothes. No State law was, therefore, violated as to the detention of these petitioners for they had been arrested on a felony, a capital offense. (See *STATE v. EXUM*, 213 N. C. 16, 195 S.E. 7. See also appellee's brief, p. 22, C.C.A. 4, No. 6330—see respondent's brief, October Term, 1949, No. 412, Misc., pp. 7-11.)

The officers who arrested the petitioners deny that they used any coercion or physical violence. Where there is a conflict of testimony on these points (*WATTS v. INDIANA*, 338 U. S. 49, 93 L. ed. 1801, 1804; *LYONS v. OKLAHOMA*, 322 U. S. 596, 88 L. ed. 1481; *LISENBA v. CALIFORNIA*, 314 U. S. 219, 86 L. ed. 166), the Federal Courts do not consider the question on its merits, and the findings of the State Court being supported by substantial evidence is allowed to stand. The mere questioning of a suspect while in the custody of police officers (*GALLEGOS v. NEBRASKA*, No. 94, October Term, 1951; *LYONS v. OKLAHOMA*, 322 U. S. 596, 88 L. ed. 1481) is not prohibited by common law or by the due process clause of the Federal Constitution.

Under the North Carolina practice, the trial judge, in the absence of the jury, determines whether or not the confession was voluntary and should, therefore, be or not be submitted to the jury. See *STATE v. WHITENER*, 191 N. C. 659, 132 S.E. 603; *STATE v. ROGERS*, 216 N. C. 731, 6 S.E. (2d) 499; *STATE v. DICK*, 60 N. C. 440. The facts that render a confession involuntary, the admissibility of

the evidence to establish such facts and the existence of evidence to support a finding as to admissibility (STATE v. CROWSON, 98 N. C. 595, 4 S.E. 143) are questions of law subject to review. The weight of the evidence and the credibility of the witnesses offered to prove or disprove such facts are matters for the trial judge and will not be reviewed. See STATE v. GRASS, 223 N. C. 31, 25 S.E. (2d) 193; STATE v. GOSNELL, 208 N. C. 401, 181 S.E. 323. If the confession is admitted in evidence, its weight is for the jury (STATE v. HARDEE, 83, N. C. 619; STATE v. HENDERSON, 180 N. C. 735, 105 S.E. 339), and the jury may believe the confession or not, and the jury is the judge of its sufficiency to prove the fact confessed. The States use different methods to test the voluntariness of a confession (STATE v. CRANK, 170 A.L.R. 542, Anno. p. 567), and North Carolina is included in the twelve States that use this same method. If the method used gives opportunity for notice and hearing and other fundamentals of fairness, the State can use its own method of determining the voluntariness of confessions, and no question arises under the due process or the equal protection of the law clause of the Fourteenth Amendment. See LISENBA v. CALIFORNIA, *supra*; WARD v. TEXAS, 316 U. S. 547, 86 L. ed. 1663; LYONS v. OKLAHOMA, *supra*.

Petitioners having raised the issue as to the constitutionality of the admissions of the confessions and this issue having been decided against them by the trial Court, the petitioners cannot now re-try these issues in the Federal Court by collateral attack through the use of a habeas corpus process.

COLLINS v. McDONALD, 258 U. S. 416, 66 L. ed. 692  
 SCHRAMM v. BRADY, 4 Cir., 129 Fed. (2d) 109  
 MILLER v. HIATT, 3 Cir., 141 Fed. (2d) 691  
 BURALL v. JOHNSON, 9 Cir., 134 Fed. (2d) 614  
 U. S. v. LOWREY, D. C., Pa. 84 Fed. Supp. 804  
 HARLAN v. MCGOURIN, 218 U. S. 442, 54 L. ed. 1101  
 SNELL v. MAYO, 5 Cir., 173 Fed. (2d) 704  
 EURY v. HUFF, App. D. C., 146 Fed. (2d) 704  
 MASSEY v. HUMPHREY, D. C., Pa., 85 Fed. Supp. 534



U. S. EX REL. v. HIATT, D. C. Pa., 33 Fed. Supp. 1002  
 U. S. EX REL. HOLLY v. PA., D. C. Pa., 81 Fed. Supp.  
 861

(Affirmed) 3 Cir., 174 Fed. (2d) 480

WALLACE v. HUNTER, 10 Cir., 149 Fed. (2d) 59

SMITH v. LAWRENCE, 5 Cir., 128 Fed. (2d) 822

In the case of COLLINS v. McDONALD, 258 U. S. 416,  
 66 L. ed. 692, the Court said:

"It is also charged that there was no evidence of guilt before the court-martial other than the confession of the accused, which, it is averred, was made, under oath, to and at the instance of his superior officer, under duress; whereby it is alleged he was compelled to become a witness against himself, in violation of the Constitution of the United States. This, in substance, is a conclusion of the pleader, unsupported by any reference to the record, and, at most, was an error in the admission of testimony, which cannot be reviewed in a habeas corpus proceeding. Cases, *supra*."

In the case of SCHRAMM v. BRADY, 4 Cir., 129 Fed. (2d) 109, the Court said:

"Nor can the writ of habeas corpus be used to review alleged error of the state court in admitting evidence of a confession, for habeas corpus cannot be used as a writ of error."

In the case of U. S. v. LOWREY, D. C., Pa., 84 Fed. Supp. 804, the Court said:

"The contention that the confession was secured under circumstances rendering it inadmissible presents a question of admissibility of evidence which was an appropriate matter for an appeal, and hence not subject to review by habeas corpus."

In the case of BURALL v. JOHNSON, 9 Cir., 134 Fed. (2d) 614, the Court said:

"The time to inquire into the circumstances of the confession was during the progress of the trial, and error committed, if any, was subject to correction on appeal."

In the case of WALLACE v. HUNTER, 10 Cir., 149 Fed. (2d) 59, the Court said:

"At the habeas corpus hearing Story testified that at the trial on the criminal charge he testified that 'they threatened me to give it', referring to the confession. The confession, on its face, recites: 'I make this statement freely and voluntarily, no force, coercion, threat, promise or inducement having been made in order to obtain this statement from me. I have been advised that I am not required to make this statement, that I have the right to an attorney, and that this statement may be used against me in Court.' The evidence adduced at the habeas corpus hearing affords no basis for a holding on this, a collateral attack, that the trial court and jury were not fully warranted in finding that the confession was freely and voluntarily made."

In the case of PERRY v. HIATT, D.C., App. 33 Fed. Supp. 1023, the Court said:

"Relator's argument that because he had a mistaken idea of the nature of the offense charged and was thereby misled into making a false confession, raises a question which this court cannot consider in habeas corpus proceedings. *Widener v. Harris*, 4 Cir., 60 F. 2d 956."

In the case of EURY v. HUFF, App. D. C., 146 Fed. (2d) 17, the Court said:

"Assuming the petition means that an involuntary confession was actually received in evidence, still that question could not be retried by the procedure of habeas corpus. Sufficiency of the evidence to support a conviction is not jurisdictional and is not open to review in habeas corpus proceedings."

#### IV.

NO CONSTITUTIONAL QUESTION IS PRESENTED BY THE TRIAL COURT'S INSTRUCTIONS TO THE JURY AS TO THE ADMISSION OF THE CONFESSIONS.

Petitioners contend that the trial Court's instructions to the jury as to the admissibility of the confessions deprived them of the right of trial by jury. The instructions of the trial Court will be found on p. 37 of the appendix

of appellee's brief, C.C.A. 4. No. 6330. (See also S.Tr. Vol. 4, p. 642 and p. 676.) A reading of the instruction complained of will show that counsel for petitioners had been making argument to the jury on the question as to whether or not the confessions had been made freely and voluntarily. The instructions of the Court as to the admissibility of the confessions (STATE v. FAIN, 216 N. C. 157, 4 S.E. (2d) 319) were legal and proper according to State law; and under the holdings of this Court, no constitutional question under the Fourteenth Amendment is presented. See DAVIS v. TEXAS, 139 U. S. 651, 35 L. ed. 300; HOWARD v. KENTUCKY, 200 U. S. 164, 50, L. ed. 421; MILLER v. TEXAS, 153 U. S. 535, 38 L. ed. 812; CARTER v. ILLINOIS, 329 U. S. 173, 91 L. ed. 172; BUCHALTER v. NEW YORK, 319 U. S. 427, 87 L. ed. 1492; SNYDER v. MASSACHUSETTS, 291 U. S. 97, 73 L. ed. 674; CHAPLINSKY v. NEW HAMPSHIRE, 315 U. S. 568, 86 L. ed. 1031.

In our statement of facts, we quoted another confession made by Lloyd Ray Daniels when he was at the State Hospital at Goldsboro which was made without any coercion or threats but for the first time came to the knowledge of the State at the Federal hearing on *habeas corpus*.

## V.

THE PETITIONERS HAVING FAILED TO PERFECT THEIR APPEAL TO THE SUPREME COURT OF NORTH CAROLINA, NO CONSTITUTIONAL QUESTION IS PRESENTED AS TO ANY DEPRIVATION OF RIGHT TO APPEAL.

The petitioners contend, on the authority of DOWD v. UNITED STATES EX REL. COOK, 340 U. S. 206, 95 L. ed. 215, and COCHRAN v. KANSAS, 316 U. S. 255, 86 L. ed. 1453, that they had been unconstitutionally deprived of their right of appeal. The answer to this is that the petitioners had available an appeal to a Supreme Court that reviews all of the constitutional questions raised by petitioners. They failed to perfect the appeal according to

State practice, and the rules of procedure as to appeals in North Carolina are applicable to all people of all races. It cannot be shown, nor do petitioners even contend, that any State officer prevented petitioners from meeting these procedures. The cases relied on by petitioners on this point deal with situations where officials and agents of State Penitentiaries retained and prevented appeal papers from leaving the Penitentiaries and thus prevented those petitioners from perfecting their appeals in time. There is absolutely no analogy whatever to the situation now before the Court.

## VI.

### PETITIONERS CANNOT USE HABEAS CORPUS AS A SUBSTITUTE FOR AN APPEAL.

The principle stated above is an old principle, but it is supported by many cases. It is perfectly plain from the record in this case that the petitioners having failed to perfect their appeal are simply trying now to use the writ of *habeas corpus* as a substitute for the appeal which they could have had but lost through their own negligence. Because constitutional questions are raised in a State Court in a criminal trial, this does not, within itself, warrant the review of such questions on habeas corpus. See *EURY v. HUFF*, 141 Fed. (2d) 554, 555, C.C.A. 4; *GLASGOW v. MOYER*, 225 U. S. 420, 56 L. ed. 1147; *GRAHAM v. SQUIER*, 132 Fed. (2d) 681, C.C.A. 9.



## CONCLUSION

The record in this case justifies the conclusion that the petitioners murdered their victim in a cruel, horrible and savage manner, and they themselves admit that they committed this murder. Their admission is corroborated by other facts and circumstances. In interpreting the Constitution of the United States, Federal statutes and State laws, and in balancing the rights of the parties, we ask the Court to consider the claims of the victim of this murder.

Respectfully submitted,

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## APPENDIX

## Chapter 4, General Statutes of North Carolina:

§ 1-279. *When appeal taken, stay of execution.*—The appeal must be taken from a judgment rendered out of term within ten days after notice thereof, and from a judgment rendered in term within ten days after its rendition, unless the record shows an appeal taken at the trial, which is sufficient, but execution shall not be suspended until the giving by the appellant of the undertakings hereinafter required.

§ 1-282. *Case on appeal; statement, service, and return.*—The appellant shall cause to be prepared a concise statement of the case, embodying the instructions of the judge as signed by him, if there be an exception thereto, and the request of the counsel of the parties for instructions if there be any exceptions on account of the granting or withholding thereof, and stating separately, in articles numbered, the errors alleged. A copy of this statement shall be served on the respondent within 15 days from the entry of the appeal taken; within 10 days after such service the respondent shall return a copy with his approval or specific amendments indorsed or attached; if the case be approved by the respondent, it shall be filed with the clerk as a part of the record; if not returned with objections within the time prescribed, it shall be deemed approved: Provided, that the judge trying the case shall have the power, in the exercise of his discretion, to enlarge the time in which to serve statement of case on appeal and exceptions thereto or counter statement of case.

## Chapter 7, General Statutes of North Carolina:

§ 7-63. *Original jurisdiction.*—The superior Court has original jurisdiction of all civil actions whereof exclusive original jurisdiction is not given to some other court; and of all criminal actions in which the punishment may exceed a fine of fifty dollars, or imprisonment for thirty days; and of all such affrays as shall be committed within one

mile of the place where, and during the time, such court is being held; and of all offenses whereof exclusive original jurisdiction is given to justices of the peace, if some justice of the peace shall not within twelve months after the commission of the offense proceed to take official cognizance thereof.

#### Chapter 9, General Statutes of North Carolina:

§ 9-1. The board of county commissioners for the several counties, at their regular meetings on the first Monday in June in the year 1947, or the jury commissions or such other legally constituted body as may in the respective counties be charged by law with the duty of drawing names of persons for jury service, at the times of their regular meetings, and every two years thereafter, shall cause their clerks to lay before them the tax returns for the preceding year for their county, and a list of names of persons who do not appear upon the tax lists, who are residents of the county and over twenty-one years of age, from which lists the board of county commissioners or such persons who reside in the county who are of good moral character and have sufficient intelligence to serve as members of grand and petit juries. A list of the names thus selected by the board of county commissioners or such jury commissions shall be made out by the clerk of the board of county commissioners or such jury commissions and shall constitute the jury list of the county and shall be preserved as such.

The clerk of the board of county commissioners or such jury commissions, in making out the list of names to be laid before the board of county commissioners or such jury commissions, may secure said lists from such sources of information as deemed reliable which will provide the names of persons of the county above twenty-one years of age residing within the county qualified for jury duty. There shall be excluded from said lists all those persons who have been convicted of any crime involving moral turpitude or who have been adjudged to be non compos mentis.

§ 9-2. *Names on list put in box.*—The commissioners at their regular meeting on the first Monday in July in the year nineteen hundred and five, and every two years thereafter, shall cause the names on their jury list to be copied on small scrolls of paper of equal size and put into a box procured for that purpose, which must have two divisions marked No. 1 and No. 2, respectively, and two locks, the key of one to be kept by the sheriff of the county, the other by the chairman of the board of commissioners, and the box by the clerk of the board.

§ 9-3. *Manner of drawing panel for term from box.*—At least twenty days before each regular or special term of the superior court, the board of commissioners of the county shall cause to be drawn from the jury box out of the partition marked No. 1, by a child not more than ten years of age, thirty-six scrolls except when the term of court is for the trial of civil cases exclusively, when they need not draw more than twenty-four scrolls. The persons whose names are inscribed on said scrolls shall serve as jurors at the term of the superior court to be held for the county ensuing such drawing, and for which they are drawn. The scrolls so drawn to make the jury shall be put into the partition marked No. 2. The said commissioners shall at the same time and in the same manner draw the names of eighteen persons who shall be summoned to appear and serve during the second week, and a like number for each succeeding week of the term of said court, unless the judge thereof shall sooner discharge all jurors from further service. The said commissioners may, at the same time and in the same manner, draw the names of eighteen other persons, who shall serve as petit jurors for the week for which they are drawn and summoned. The trial jury which has served during each week shall be discharged by the judge at the close of said week, unless the said jury shall be then actually engaged in the trial of a case, and then they shall not be discharged until the trial is determined.

§ 9-6. *Jurors having suits pending.*—If any of the jurors drawn have a suit pending and at issue in the superior



court, the scrolls with their names must be returned into partition No. 1 of the jury box.

§ 9-7. *Disqualified persons drawn.*—If any of the persons drawn to serve as jurors are dead, removed out of the county, or otherwise disqualified to serve as jurors, the scrolls with the names of such persons must be destroyed, and in such cases other persons shall be drawn in their stead.

§ 9-8. *How drawing to continue.*—The drawing out of partition marked No. 1 and putting the scrolls drawn into partition No. 2 shall continue until all the scrolls in partition No. 1 are drawn out, when all the scrolls shall be returned into partition No. 1 and drawn out again as herein directed.

§ 9-19. *Exemptions from jury duty.*—All practicing physicians, licensed druggists, telegraph operators who are in the regular employ of any telegraph company or railroad company, train dispatchers who have the actual handling of either freight or passenger trains, regularly licensed pilots, regular ministers of the gospel, officers or employees of a state hospital for the insane, active members of a fire company, funeral directors and embalmers, printers and linotype operators, all millers of grist mills, all United States railway postal clerks and rural free delivery mail carriers, locomotive engineers, brakemen and railroad conductors in active service, radio broadcast technicians, announcers, and optometrists, registered or practical nurses in active practice and practicing attorneys at law, and all members of the national guard, North Carolina state guard and members of the civil air patrol, naval militia, officers reserve corps, enlisted reserve corps, and the naval reserves, who comply with and perform all duties required of them as members of the national guard, naval militia, officers reserve corps, enlisted reserve corps, and the naval reserves, shall be exempt from service as jurors.

§ 9-24. *How grand jury drawn.*—The judges of the superior court, at the terms of their courts, except those

terms which are for the trial of civil cases exclusively, and special terms for which no grand jury has been ordered, shall direct the names of all persons returned as jurors to be written on scrolls of paper and put into a box or hat and drawn out by a child under ten years of age; whereof the first eighteen drawn shall be a grand jury for the court; and the residue shall serve as petit jurors for the court.

§ 9-29. *Special venire to sheriff in capital cases.*—When a judge of the superior court deems it necessary to a fair and impartial trial of any person charged with a capital offense, he may issue to the sheriff of the county in which the trial may be a special writ of venire facias, commanding him to summon such number of persons qualified to act as jurors in said county as the judge may deem sufficient (such number being designated in the writ), to appear on some specified day of the term as jurors of said court; and the sheriff shall forthwith execute the writ and return it to the clerk of the court on the day when it is returnable, with the names of the jurors summoned.

§ 9-30. *Drawn from jury box in court by judge's order.*—When a judge deems a special venire necessary, he may, at his discretion, issue an order to the clerk of the board of commissioners for the county, commanding him to bring into open court forthwith the jury boxes of the county, and he shall cause the number of scrolls as designated by him to be drawn from box number one by a child under ten years of age. The names so drawn shall constitute the special venire, and the clerk of the superior court shall insert their names in the writ of venire, and deliver the same to the sheriff of the county, and the persons named in the writ and no others shall be summoned by the sheriff. If the special venire is exhausted before the jury is chosen, the judge shall order another special venire until the jury has been chosen. The scrolls containing the names of the persons drawn as jurors from box number one shall, after the jury is chosen, be placed in box number two, and if box number one is exhausted before the jury is chosen,

the drawing shall be completed from box number two after the same has been well shaken.

#### Chapter 14, General Statutes of North Carolina:

§ 14-17. *Murder in the first and second degree defined; punishment.*—A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death: Provided, if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the state's prison; and the court shall so instruct the jury. All other kinds of murder shall be deemed murder in the second degree, and shall be punished with imprisonment of not less than two nor more than thirty years in the state's prison.

#### Chapter 15, General Statutes of North Carolina:

§ 15-41. *When officer may arrest without warrant.*—Every sheriff, coroner, constable, officer of police, or other officer, entrusted with the care and preservation of the public peace, who shall know or have reasonable ground to believe that any felony has been committed, or that any dangerous wound has been given, and shall have reasonable ground to believe that any particular person is guilty, and shall apprehend that such person may escape, if not immediately arrested, shall arrest him without warrant, and may summon all bystanders to aid in such arrest.

§ 15-42. *Sheriffs and deputies granted power to arrest felons anywhere in state.*—When a felony is committed in any county in this State, and upon the commission of the felony, the person or persons charged therewith flees or flee the county, the sheriff of the county in which the crime was committed, and/or his bonded deputy or de-

puties, either with or without process, is hereby given authority to pursue the person or persons so charged, whether in sight or not, and apprehend and arrest him or them anywhere in the State.

§ 15-180. *Appeal by defendant to supreme court.*—In all cases of conviction in the superior court for any criminal offense, the defendant shall have the right to appeal, on giving adequate security to abide the sentence, judgment or decree of the supreme court, and the appeal shall be perfected and the case for the supreme court settled, as provided in civil actions.



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**Supreme Court of the United States**

OCTOBER TERM, 1951

No. 626

**BENNIE DANIELS AND LLOYD RAY DANIELS,**  
PETITIONERS,

vs.

**ROBERT A. ALLEN, WARDEN OF THE CENTRAL  
PRISON OF NORTH CAROLINA,**  
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF OF RESPONDENT, ROBERT A. ALLEN, WARDEN  
OF THE CENTRAL PRISON OF NORTH CAROLINA.

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IN THE  
Supreme Court of the United States

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OCTOBER TERM, 1951

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No. 626

BENNIE DANIELS AND LLOYD RAY DANIELS,  
PETITIONERS,

vs.

ROBERT A. ALLEN, WARDEN OF THE CENTRAL  
PRISON OF NORTH CAROLINA,  
RESPONDENT.

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE FOURTH CIRCUIT.

---

BRIEF OF RESPONDENT, ROBERT A. ALLEN, WARDEN  
OF THE CENTRAL PRISON OF NORTH CAROLINA.

---

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, (R. 323) is reported at 192 F. (2d) 763. The opinion of the District Judge is reported at 99 F. Supp. 208, sub. nom. DANIELS, ET AL. v. CRAWFORD (R. 83).

Opinions of the Supreme Court of North Carolina that deal with this case are reported as follows:

STATE v. DANIELS, 231 N. C. 17, 56 S.E. (2d) 2  
(Certiorari)

STATE v. DANIELS, 231 N. C. 341, 56 S.E. (2d) 646  
(Coram Nobis)

STATE v. DANIELS, 231 N. C. 509, 57 S.E. (2d) 653  
(Appeal dismissed)

STATE v. DANIELS, 232 N. C. 196, 59 S.E. (2d) 430  
(Coram Nobis)

On May 8, 1950, this Court denied petitioners' application for a writ of certiorari, and this denial is reported as DANIELS v. NORTH CAROLINA, 339 U. S. 954, 94 L. ed. 1366.

## QUESTIONS PRESENTED

1. Where petitioners (Negroes) in State criminal trial raise constitutional issues as to organization of grand and/or petit juries because of alleged racial discrimination, and these issues are determined adversely to petitioners, may a judgment of conviction in State court be challenged collaterally upon these same issues and grounds by a Federal habeas corpus proceeding.

2. Where petitioners in State criminal trial object to admission of confessions on constitutional grounds, alleging brutality, coercion and unlawful detention, and these issues are determined adversely to petitioners after hearing according to State practice, may a judgment of conviction in State court be challenged collaterally upon these same constitutional grounds by a Federal habeas corpus proceeding.

3. If Federal habeas corpus can be used to collaterally challenge a judgment of conviction in a State criminal trial, have petitioners established unconstitutional discrimination in the selection of grand and/or petit juries and that involuntary confessions were admitted in evidence against petitioners.

4. If Federal habeas corpus can be used to collaterally challenge a judgment of conviction in a State criminal trial on grounds that confessions have been unconstitutionally obtained, have petitioners established that the confessions in this case were unconstitutionally obtained and, therefore, should not have been admitted in evidence.

5. Where petitioners have been convicted in a State criminal trial, may the judgment of conviction in State court be challenged collaterally, upon the grounds that the trial judge improperly instructed the jury as to the voluntariness of confessions, by Federal habeas corpus proceeding.



6. Where petitioners have been convicted in a State criminal trial and have right of appeal to highest appellate court of State upon conditions applicable to all persons and races, and petitioners fail to meet such conditions and perfect their appeal, may a judgment of conviction in State court be challenged collaterally by Federal habeas corpus proceeding upon the grounds that petitioners have been unconstitutionally deprived of their right of appeal.

7. When it appears that petitioners have been convicted in a State criminal trial wherein petitioners raised constitutional issues which were determined adversely to them by the trial court, and petitioners failed to perfect their appeal to the highest appellate court of the State which has authority to review such constitutional issues, have petitioners exhausted available State remedies and met the requirements of § 2254 of Title 28 of the United States Code.

8. Whether or not petitioners are seeking, in this case, to use a Federal habeas corpus proceeding as a substitute for an appeal to the highest appellate court of the State.

## STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED

### CONSTITUTION OF THE UNITED STATES AMENDMENT XIV

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

### THE JUDICIAL CODE, 28 U.S.C.

"§ 2241. Power to grant writ.

"(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district

court of the district wherein the restraint complained of is had.

\* \* \* \* \*

"(c) The writ of habeas corpus shall not extend to a prisoner unless—

\* \* \* \* \*

"(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or"

"§ 2254. State custody; remedies in State courts

"An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented. \* \* \*"

#### STATUTES OF NORTH CAROLINA

The statutes of North Carolina which respondent considers to be applicable and involved in this case appear in the appendix to this brief (see p. 47).

### STATEMENT AND HISTORY OF THE CASE

At the March Term, 1949, the petitioners were indicted by the grand jury of Pitt County, North Carolina, on a charge of murder in the first degree for the killing of William Benjamin O'Neal (R. 33, 303). It was suggested to the trial judge that petitioners "were without counsel and were financially unable to provide counsel," and the Court appointed "Hon. Arthur B. Corey and Hon. W. W. Speight, members of the Bar, in good standing, residing in, and engaged in the practice of law before the Courts of Pitt County" to represent petitioners (R. 304). The petitioners were duly arraigned upon the bill of indictment, and each one entered a plea of "Not Guilty." The trial was continued, and petitioners were sent to the State.

Hospital at Goldsboro for a mental examination by psychiatrists (R. 304).

When the April Term, 1949, of the Superior Court of Pitt County convened, petitioners' mental examinations had not been completed, and the case was continued until the next term or May 30, 1949. At this term (April), however, two attorneys appeared, Herman L. Taylor, of the Wake County Bar, and C. J. Gates, of the Durham County Bar, and stated that they had been employed to represent petitioners. The court then discharged counsel previously appointed, and Mr. Taylor and Mr. Gates were entered of record as counsel for petitioners (R. 305).

When the case was called for trial on May 30, 1949, and after petitioners had already been arraigned and entered pleas of not guilty at a previous term, petitioners for the first time moved to quash the indictment and challenged the array of petit jurors, alleging exclusion of Negroes from the grand and petit juries because of race. The trial judge heard the evidence on these motions, made findings of fact, and overruled the motion to quash and challenge to the array (R. 303, 320).

During the trial, the State offered the confessions of petitioners. The petitioners objected to the introduction of the confessions, and in the absence of the jury, the trial judge heard the evidence of the State and petitioners, according to the North Carolina practice, and found that the confessions had been made freely and voluntarily and allowed the confessions to be used as evidence (Confessions R. 273-276; hearing on confessions: Vol. 1, State Transcript, p. 268).

The jury convicted petitioners of murder in the first degree without recommendation of life imprisonment,<sup>1</sup> and sentence of death was imposed as provided by State law. Judgment was entered on June 6, 1949, and petitioners gave notice of appeal to the Supreme Court in open court and were allowed sixty (60) days from date of judgment to serve statement of case on appeal (G.S. 1-282; appendix p. 47). The State was allowed forty-five (45) days in which to serve exceptions or

<sup>1</sup>Under the North Carolina statute (G.S. 14-17; Appendix 52), the jury at the time of rendering its verdict may recommend life imprisonment, and if the jury makes such a recommendation, a sentence of life imprisonment is mandatory. The court must instruct the jury that it has the discretion to make such recommendation.

countercase. On August 6, 1949, counsel for petitioners attempted to serve statement of case on appeal by leaving same in the office of the prosecuting attorney for the State with his secretary. This was not within the sixty (60) days fixed by the court, and the trial judge, upon motion of the prosecuting officer, struck out petitioners' case on appeal (Order of trial judge: R. 277).

Prior to the entry of the order striking out the case on appeal, petitioners applied to the Supreme Court of North Carolina for a certiorari to preserve right of appeal. The Supreme Court of North Carolina dismissed this application on November 2, 1949 (STATE v. DANIELS, 231 N. C. 17, 56 S. E. (2d) 2). Petitioners then applied to the Supreme Court of North Carolina for a writ of error coram nobis. The State filed answer, and the Supreme Court of North Carolina dismissed this application on December 14, 1949 (STATE v. DANIELS, 231 N. C. 341, 56 S. E. (2d) 646). Thereafter, upon motion of the State, the Supreme Court of North Carolina dismissed petitioners' appeal (STATE v. DANIELS, 231 N. C. 509, 57 S. E. (2d) 653). Petitioners then applied to this court for certiorari, and this application was denied by this court on May 8, 1950, without dissent (DANIELS v. NORTH CAROLINA, 339 U. S. 954, 94 L. ed. 1366).<sup>2</sup> Petitioners then applied to the Supreme Court of North Carolina for another writ of error coram nobis, and this application was dismissed on May 24, 1950. (STATE v. DANIELS, 232 N. C. 196, 59 S. E. (2d) 430).

Petitioners then applied to the District Court of the United States for the Eastern District of North Carolina for Federal habeas corpus. The respondent filed answer and motion to dismiss. The proceeding was heard, both sides introducing evidence, and the district judge made findings of fact (R. 77).

<sup>2</sup> Petitioners in their brief in support of petition for certiorari stated their doubts as to obtaining relief by writ of error coram nobis. Respondent in its brief suggested that the denial was due to procedural rather than substantive reasons. Subsequently the Supreme Court denied another application of petitioners for coram nobis, saying that the writ was not a substitute for an appeal and applied to matters extraneous to the record. (STATE v. DANIELS, 232 N. C. 196, 59 S. E. (2d) 430; See respondent's brief, No. 271, Misc., October Term, 1951, pp. 12, 13, 14)



and discharged the writ and remanded petitioners to the Warden. The opinion of the district judge is reported as DANIELS, ET AL. v. CRAWFORD, 99 F. Supp. 208. (Crawford subsequently resigned as Warden and was succeeded by Allen) The petitioners appealed to the United States Court of Appeals for the Fourth Circuit, and the judgment of the District Court was affirmed, Judge Soper dissenting (DANIELS v. ALLEN; 192 F. (2d) 763). Upon application of petitioners, this Court granted certiorari.

## FACTS

In attempting to state respondent's version of the facts, we will refer to the Federal Transcript of Evidence as "F.Tr.", and to the four volumes of the State Transcript of Evidence as "S.Tr.". All references will be made to the printed record in this Court where possible.

On February 5, 1949, petitioners, Bennie Daniels and Lloyd Ray Daniels, were seen in Greenville, where Bennie Daniels, armed with a knife, engaged in a fight with the witness, James Henry Riddick (1 S.Tr. 169). Charlie Moore testified that between nine and ten o'clock, petitioners were engaged in fighting and brawling. Bennie Daniels was again observed with a knife (1 S.Tr. 176). At a late hour, petitioners tried to hire the taxicab of Leslie Manning who refused (1 S.Tr. 180). Petitioners were seen by Norman Tripp getting into O'Neal's cab which was parked close to Tripp's cab. The witness Tripp saw O'Neal get into his cab, where petitioners were already seated, and drive off in the direction of Grimesland (1 S.Tr. 182).

O'Neal's body was found by the witness, Leroy Smith, on Sunday morning, February 6, 1949, near some tobacco barns located close to a country road (2 S.Tr. 341). The cab door was open. O'Neal's overcoat was near the door, and the glove compartment of the cab was open. Near the cab was found O'Neal's empty billfold, taxicab permit, picture, papers showing Social Security number and driver's license. O'Neal's whole body showed that he had been slashed, crushed and beaten as if by someone seized with maniacal fury and bloodthirst. Tobacco sticks and bricks with bloodstains were found near O'Neal's body (1 S.Tr. 193; 2 S.Tr. 306; 2 S.Tr. 357; 2 S.

Tr. 430). New and used rubber contraceptives were found at the scene of the crime indicating that this was a place of assignation, but the race of the person using the place for such purposes is not disclosed by the evidence. Rubber contraceptives were found in the watch pocket of Bennie Daniels after his arrest (2 S.Tr. 385, 441).

The overcoat was identified as belonging to O'Neal by his mother and the witness Phillips (2 S.Tr. 325; 2 S.Tr. 356). The woman's glove was shown to have been in the cab before O'Neal received it for driving purposes (2 S.Tr. 353; 2 S.Tr. 355).

The discovery of O'Neal's body was reported to the sheriff (2 S.Tr. 349), and the officers, having been informed that bloody clothes were at the home of Lloyd Ray Daniels and that one of the petitioners had sent word to destroy the clothes, proceeded to search for petitioners. Lloyd Ray Daniels was arrested on Monday morning (February 7, 1949) between one and one-thirty o'clock. He was at the home of one Wilkes on the L. O. Whitehurst farm. He was lying on a cot with his shoes on, fully dressed except his hat. There was cold blood found on the back of his left ear, and scratches around and under his neck with small cuts on his hands (1 S.Tr. 199-200). He was taken in an automobile to Williamston, County seat of the adjoining County of Martin, and placed in jail. While on the way to Williamston, Lloyd Ray Daniels made statements in which he admitted that he helped kill O'Neal and gave some details as to the murder (2 S.Tr. 357; 2 S.Tr. 261).

Petitioner, Bennie Daniels, was arrested Tuesday morning (February 8, 1949) between five and six o'clock in the morning on the Bryan Tripp farm, near the Town of Winterville. When arrested, he was standing behind the door fully dressed (1 S.Tr. 270). He was placed in an automobile, and on the way to Williamston, he admitted that he participated in the killing of O'Neal (2 S.Tr. 355, 356).

On Tuesday night (February 8, 1949), the officer's questioned the petitioners in the jail at Williamston, and written confessions were signed by petitioners (Confessions: R. 273-276; See also 1 S.Tr. 273-276; 1 S.Tr. 276-278; 1 S.Tr. 363-364; See further evidence on confessions: 1 S.Tr. 284, 389, 216, 219, 258, 259, 271, 366, 383-384). As to the confessions, the Court may want to examine the evidence in the Federal Transcript

of Evidence at the reference following: F.Tr. 189, 190; F.Tr. 192, 193; F.Tr. 244-246; F.Tr. 266-267; F.Tr. 270, 271; F.Tr. 285-289; F.Tr. 301-304; F.Tr. 311-314; F.Tr. 319, 320. These various statements and confessions were introduced in evidence against petitioners after the court held a hearing according to the State practice and found the confessions had been made freely and voluntarily (1 S.Tr. 268; R. 272).

While petitioner, Lloyd Ray Daniels, was in the State Hospital at Goldsboro, he made a statement giving the details and describing how he and Bennie Daniels killed O'Neal. This statement was made to a friend of Lloyd Ray Daniels and a social worker, G. M. Johnson, who was attached to the Hospital staff. This statement was certainly obtained voluntarily, and as to this confession, it has never been shown that any coercion, threats or physical violence was used. This confession was not used at the State trial because the State had no information about it until the hearing on Federal habeas corpus in the District Court at Tarboro, North Carolina. See respondent's Exhibit R-2, R. 97 for this confession; see R. 234 for evidence showing circumstances under which this statement was obtained.

## ARGUMENT

### I.

WHERE PETITIONERS (NEGROES) IN A STATE CRIMINAL TRIAL CHALLENGE ORGANIZATION OF GRAND JURY AND PETIT JURY ON GROUND OF RACIAL DISCRIMINATION AND THE ISSUES ARE DECIDED AGAINST PETITIONERS, A STATE JUDGMENT OF CONVICTION CANNOT BE CHALLENGED COLLATERALLY ON THESE SAME ISSUES, DECIDED BY THE STATE COURT, IN A FEDERAL HABEAS CORPUS PROCEEDING.

In presenting this portion of our argument, we put aside all problems engendered by the revision of the Federal habeas corpus Act (28 U.S.C., §§ 2241, 2254, pp. 3, 4). We assert that where a State judgment of conviction in a criminal trial is collaterally attacked by a civil proceeding such as Federal habeas corpus, then errors committed in the State court in

the constitution of the State grand and petit juries are considered as irregularities. These issues having been raised in the State trial and decided adversely to petitioners cannot be retried by the device of Federal habeas corpus. The fact that the issues involved relate to alleged violations of the Federal and State Constitutions does not change the principle.<sup>3</sup> These errors, if they exist, are matters to be reviewed on appeal in the State court and do not destroy the jurisdiction of the State court when the State trial is called into question on Federal habeas corpus.

The Superior Court of Pitt County is a State court of general jurisdiction (G.S. 7-63; Appendix p. 53) and has jurisdiction over the crime of murder as defined (G.S. 14-17; Appendix p. 52) by the State statute. The questions of racial discrimination in the selection of grand and petit jurors were raised by petitioners on motion to quash the indictment and challenge to the array or panel of trial jurors. Putting aside the effect of the time of making the motion to quash, this was the correct procedure (STATE v. SPELLER, 229 N. C. 67, 47 S.E. (2d) 537; STATE v. KORITZ, 227 N. C. 552, 43 S.E. (2d) 77) according to State practice for the presentation of such questions. Under the State practice, the questions raised by these motions are heard by the trial judge (STATE v. HENDERSON, 216 N. C. 99, 3 S.E. (2d) 357; STATE v. BELL, 212 N. C. 20, 192 S.E. 852; STATE v. WALLS, 211 N. C. 487,

\* GLASGOW v. MOYER, 225 U.S. 420; 56 L.ed. 1174

U.S. Ex REL. ROGALSKI v. JACKSON, 2 Cir., 146 F. (2d) 251, 256

U.S. EX REL. MURPHY v. MURPHY, 2 Cir., 108 F. (2d) 861, 862

EURY v. HUFF, 4 Cir., 141 F. (2d) 554, 555

GRAHAM v. SQUIER, 9 Cir., 132 F. (2d) 681

In the case of GRAHAM v. SQUIER, *supra*, the Circuit Court explains what it considers to be the exact decision or meaning of BOWEN v. JOHNSTON, 306 U. S. 19, 83 L. ed. 455.

\* The Court will see from the State Transcript that while ratios between white and colored populations and tax lists were shown, the petitioners' attempts to show discrimination were confined to colored witnesses who said they were eligible for jury duty but had never been called. The State showed the same situation by white witnesses as to white jurors. The jury boxes were produced and the scrolls examined, but petitioners never attempted to show the number of names of Negroes appearing on the scrolls in the jury boxes.



191 S.E. 232) and upon findings of fact, a decision is rendered. There was considerable evidence<sup>4</sup> on these motions introduced by both sides (1 S.Tr. 2-167) and the trial judge overruled petitioners' motions (R. 303-320, 4 S.Tr. 1-22) upon findings of fact shown in the record. All of these questions are subject to review by the Supreme Court of North Carolina (STATE v. SPELLER, 229 N. C. 67, 47 S.E. (2d) 537) had the petitioners seen fit to perfect their appeal. One Negro served on the trial jury that convicted petitioners.

Under these circumstances, we think the decisions of this Court and the Circuit Courts support the principle that a review of these questions is not available to the petitioners who are seeking to collaterally attack a judgment rendered in a State criminal trial by Federal habeas corpus. Having in mind that our argument at this point is focused on jury problems solely, we cite and rely upon certain cases as follows:

- IN RE WOOD, 140 U.S. 278, 35 L.ed. 505
- JUGIRO v. BRUSH, 140 U.S. 370, 35 L.ed. 511
- ANDREWS v. SWARTZ, 156 U.S. 272, 39 L.ed. 422
- KAIZO v. HENRY, 211 U.S. 146, 53 L.ed. 125
- IN RE WILSON, 140 U.S. 575, 35 L.ed. 513
- CARRUTHERS v. REED, 8 Cir., 102 F. (2d) 933
- HALE v. CRAWFORD, 1 Cir., 65 F. (2d) 739
- EURY v. HUFF, App. D.C., 146 F. (2d) 17
- SCHOLZ v. SHAUGHNESSY, App. D.C., 180 F. (2d) 450
- U. S. EX REL. McCANN v. THOMPSON, 2 Cir., 144 F. (2d) 604
- U. S. EX REL. JACKSON v. BRADY, D.C., Md., 47 F. Supp. 362
- EX PARTE CEASAR, D.C., Texas, 27 F. Supp. 690
- JOHNSON v. WILSON, D.C., Ala., 45 F. Supp. 597
- (Affirmed JOHNSON v. WILSON, 5 Cir., 131 F. (2d) 1)
- EX PARTE MURRAY, 66 Fed. Rep. 297
- STATE EX REL. PASSER v. COUNTY BOARD, 52 A.L.R. 916 (Minn.), Note p. 929

In respondent's brief filed in this Court opposing application for certiorari (DANIELS v. ALLEN, No. 271, Misc.—October Term 1951) and in our brief filed in the United States Court of Appeals for the Fourth Circuit (DANIELS v. AL-

LEN, No. 6330), we quoted from these cases, and we refer the Court to these briefs.

We are aware of the cases cited by petitioners wherein this Court has held (ROSS v. TEXAS, 341 U. S. 918, 95 L. ed. 1352; NORRIS v. ALABAMA, 294 U. S. 587, 79 L. ed. 1074; PIERRE v. LOUISIANA, 306 U. S. 354, 83 L. ed. 757; PATTON v. MISSISSIPPI, 332 U. S. 463, 92 L. ed. 76; CASSELL v. TEXAS, 339 U. S. 282, 94 L. ed. 839 and many other cases) that convictions in State courts should be reversed because Negroes were purposefully discriminated against in the selection of grand and/or petit juries. These cases, however, do not oppugn the principle for which we are contending. These cases came before this Court on writs of certiorari directed to the highest appellate courts of the States concerned, and the constitutional issues were thus reviewed directly and not by a collateral attack procedure.<sup>5</sup> Later on, we will discuss the evidential circumstances and merits relating to the issue of the selection of the grand and petit juries in this case.

## II.

PETITIONERS HAVING OBJECTED TO THE INTRODUCTION OF THEIR CONFESSIONS IN STATE CRIMINAL TRIAL ON GROUNDS THAT CONFESSIONS HAD BEEN PROCURED BY UNCONSTITUTIONAL METHODS, AND HAVING BEEN HEARD ON THIS OBJECTION ACCORDING TO STATE PRACTICE AND THE ISSUE RESOLVED AGAINST THEM, STATE JUDGMENT OF CONVICTION CANNOT NOW BE CHALLENGED COLLATERALLY BY PETITIONERS, ON THIS SAME ISSUE, BY FEDERAL HABEAS CORPUS PROCEEDING.

Independent of and aside from any question of the exhaustion of State remedies, where State rulings on the ad-

<sup>5</sup> The case of SUNAL v. LARGE, 332 U. S. 174, 91 L. ed. 1982, considered only Federal procedure and principles in the use of habeas corpus, but it is interesting to note that in the opinion of the Court, as well as in the dissenting opinion, the rule is approved that questions as to the constitution of juries are treated as irregularities that do not destroy the jurisdiction of the Court when such questions are presented by habeas corpus procedure.

missibility of confessions are examined on Federal habeas corpus any alleged errors relating thereto are viewed as matters of evidence subject to correction on State appeal. Where a collateral attack is made on a State judgment in a criminal trial, the fact that the objection to a confession is portrayed as constitutional confers no authority to expand the measure or standard of such review. Petitioners' whole brief implies that if you can magnify any question raised in a State criminal trial to a semblance of constitutional relationship, then Federal habeas corpus in an expanded form becomes immediately available to convert the Federal judiciary into appellate courts to review State action.

A polemical essay on the exclusion of confessions extorted by brutality and coercion would be entirely irrelevant in this discussion. This Court, in a series of decisions, has settled such questions, and the cases cited by petitioners are well known to the legal profession.<sup>6</sup> These cases were considered by this Court on direct review by writs of certiorari directed to the highest appellate courts of the States involved. No doubt, the petitioners could have availed themselves of this method of review had they seen fit to exercise any reasonable promptitude in pursuing their right of State appeal or had they seen fit to retain the attorneys first assigned to them by the State.

In the State trial, both sides offered evidence (R. 74-122; F. Tr. 187ff, 238ff, 243ff, 254ff, 260ff, 284ff, 300ff, 311ff; See also evidence of these same witnesses in State Transcript) as to how the confessions were procured. On this point, the evidence was elicited in the absence of the jury. Under the North

<sup>6</sup> BROWN v. MISSISSIPPI, 297 U. S. 278, 80 L. ed. 682; CHAMBERS v. FLORIDA, 309 U. S. 227, 84 L. ed. 716; MALINSKI v. NEW YORK, 324 U. S. 401, 89 L. ed. 1029; WATTS v. INDIANA, 338 U. S. 49, 93 L. ed. 1801; TURNER v. PENNSYLVANIA, 338 U. S. 62, 93 L. ed. 1810. Petitioners also cite other cases to the same effect.

We do not consider that cases such as VON MOLTKE v. GILLIES, 332 U. S. 708, 92 L. ed. 309, have any reasonable application when applied to State action. The VON MOLTKE case originated in a Federal court. No State ruling was involved. We do not see how the States could have any possible complaint as to the procedural scope of habeas corpus which this Court grants to the lower Federal courts in Federal cases.

Carolina practice, the trial judge determines (STATE v. WHITENER, 191 N. C. 659, 132 S.E. 603; STATE v. ROGERS, 216 N.C. 731, 6 S.E. (2d) 499; STATE v. DICK, 60 N. C. 440) as a preliminary question, whether or not the confession was voluntary in character and should be, or not be, submitted to the jury.

In the State trial, petitioners had an ample opportunity to be heard and introduce all the evidence they desired. On this aspect of the case, the same method and practice was employed by the trial judge as is utilized in considering the confessions of white persons, and this has been the practice in the North Carolina courts for many decades.

The present status of the decisions supports our position that these issues having been adjudicated in the State court, petitioners cannot now retry these same issues by collateral attack on the State judgment through the instrumentality of Federal habeas corpus.<sup>7</sup> COLLINS v. McDONALD, 258 U. S. 416, 66 L. ed. 692; HARLAN v. MCGOURIN, 218 U. S. 442, 54 L. ed. 1101; SMITH v. U. S., 187 F. (2d) 192 (D.C. Cir.); MILLER v. HIATT, 3 Cir., 141 F. (2d) 691; SCHRAMM v.

<sup>7</sup> COLLINS v. McDONALD, 258 U. S. 416, 66 L. ed. 692.

"It is also charged that there was no evidence of guilt before the court-martial other than the confession of the accused, which, it is averred, was made, under oath, to and at the instance of his superior officer, under duress, whereby it is alleged he was compelled to become a witness against himself, in violation of the Constitution of the United States. This in substance, is a conclusion of the pleader, unsupported by any reference to the record, and, at most, was an error in the admission of testimony, which cannot be reviewed in a habeas corpus proceeding. Cases, *supra*."

PERRY v. HIATT, D. C., App. 33 Fed. Supp. 102.

"Relator's argument that because he had a mistaken idea of the nature of the offense charged and was thereby misled into making a false confession, raises a question which this court cannot consider in habeas corpus proceeding. Widener v. Harris, 4 Cir., 60 F. 2d 956."

EURY v. HUFF, App. D. C., 146 Fed. (2d) 17.

"Assuming the petition means that an involuntary confession was actually received in evidence, still that question could not be retried by the procedure of habeas corpus. Sufficiency of the evidence to support a conviction is not jurisdictional and is not open to review in habeas corpus proceedings."



BRADY, 4 Cir., 129 F. (2d) 109; BURRALL v. JOHNSTON, 9 Cir., 134 F. (2d) 614; SNELL v. MAYO, 5 Cir., 173 F. (2d) 704; EURY v. HUFF, App. D. C., 146 F. (2d) 704; WALLACE v. HUNTER, 10 Cir., 149 F. (2d) 59; SMITH v. LAWRENCE, 5 Cir., 128 F. (2d) 822; MASSEY v. HUMPHREY, D. C. Pa., 85 F. Supp. 534; U. S. v. LOWREY, D. C. Pa., 84 F. Supp. 804; U. S. EX REL. v. HIATT, D. C. Pa., 33 F. Supp. 1002; U. S. EX REL. HOLLY v. PA., D. C. Pa., 81 F. Supp. 861 (Affirmed 3 Cir., 174 F. (2d) 480).

### III.

PETITIONERS HAVE NOT SHOWN THAT PERSONS OF THEIR RACE WERE ARBITRARILY, INTENTIONALLY AND SYSTEMATICALLY EXCLUDED IN THE SELECTION OF THE GRAND JURY AND PETIT JURY.

The petitioners were arraigned at the March Term, 1949, of the Superior Court of Pitt County, and at this same term, they entered a plea of not guilty (R. 304). At the same term of the Superior Court, the judge appointed W. W. Speight and Arthur Corey, both residents and members of the Bar of Pitt County, to represent the petitioners.\* At the April Term of the Superior Court of Pitt County, Mr. Gates and Mr. Taylor presented themselves to the court and said they had been retained to represent the petitioners, and the court, therefore, discharged counsel previously appointed and entered Mr.

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\*These attorneys lived in Pitt County and were well acquainted with persons likely to be called for jury duty. W. W. Speight was an experienced criminal lawyer and had had considerable experience in the office of the Attorney General of the State. Arthur Corey had lived all of his life in Pitt County and was a good trial lawyer. He had served in the State Senate for a number of years and had traveled all over the County many times in political campaigns. These attorneys did not think that it was to the best interest of petitioners to attempt to quash the bill of indictment and challenge the array or trial panel for reasons of alleged racial discrimination (R. 223ff). Petitioners preferred, however, to accept the services of two attorneys, one of whom was a member of the Wake County Bar, and another of the Durham County Bar, who resided a considerable distance from Pitt County and who, so far as this record shows, had not previously practiced in Pitt County.

Gates and Mr. Taylor as counsel for petitioners. When the trial began at the May Term, 1949, petitioners, for the first time, made a motion to quash the bill of indictment for racial exclusion of colored people from the grand jury and entered a challenge to the array as to the petit jury for the same reason (1 S.Tr. 167). The court heard the evidence offered by both sides on these motions (1 S.Tr. 2-167), made findings of fact (R. 303) and overruled both motions (R. 320). According to the State practice, a motion to quash a bill of indictment must be entered before the persons indicted plead to the bill of indictment. If the motion to quash is made after arraignment and plea of not guilty have been entered, the allowance of the motion is in the discretion of the court.<sup>9</sup> In overruling these motions, the ruling of the court was based both upon the merits and in the exercise of the court's discretion (1 S.Tr. 167). It is not contended by petitioners that the persons who actually served on the grand jury which indicted them were not eligible grand jurors. Therefore, under these circumstances, the petitioners have waived any right to make any objection to the selection of the grand jury or to quash the bill of indictment for reasons of racial discrimination. The motion not having been made in apt time according to State practice, all rights to quash the bill for these reasons are waived, and this contention has the support of one Circuit Court in a situation almost identical.<sup>10</sup>

<sup>9</sup> STATE v. BURNETT, 142 N. C. 577, 55 S. E. 72; STATE v. BEAL, 199 N. C. 278, 294, 154 S. E. 604, 613; STATE v. BREWER, 180 N. C. 716, 717, 104 S. E. 655, 656.

<sup>10</sup> CARRUTHERS v. REED, 8 Cir., 102 F. (2d) 933:

"But the record in this case discloses that the attorney, Mr. Adams, in conducting the defense for the appellants, was fully advised and gave careful consideration to the fact that negroes had been and were excluded from the jury panels. He was also familiar with the decision of the Supreme Court affirming the rights of the appellants under the equal protection clause of the Federal Constitution on account of the exclusion of persons of their race from the jury panel. He considered whether or not he should raise the point by motion to quash the panel and decided, after deliberation, not to do so. From the record it appears that this decision was influenced by two considerations: First, it might prejudice his clients; and secondly, he seems to have felt that the jury panel was favorable, that is, as he expressed it, 'a very good jury.' \* \* \*

As we have pointed out before, the petitioners, in attempting to show racial discrimination, followed the plan or system of introducing many colored witnesses who testified as to their qualifications to serve on juries and further that they had never been called for jury service. To controvert this method of showing discrimination, the State introduced many white witnesses who testified that they too were qualified for jury duty and had never served on any jury. The jury boxes were brought into court and examined, but petitioners never attempted to show the number of Negro jurors appearing on the scrolls in the boxes (R. 312). It was admitted by both sides that the jury boxes of the County contained the names of approximately 10,000 persons of both the white and colored race. It appeared before the trial judge that the population of Pitt County was 61,244 persons, of which 32,151 belonged to the white race and 29,086 belonged to the colored race (R. 134ff). The evidence before the State court was to the effect that 17,323 persons of the white race were over twenty-one years of age, and 13,762 persons of the Negro race were over twenty-one years of age. The list of names on the tax records for 1946 would be the applicable year from which names would be selected; on this tax list were 15,517 names, and of these 10,344 were white persons, and 5,773 were colored. In 1945, there were 14,368 names listed, of which 9,466 were white, and 4,902 were colored. In 1947, there were 16,455 names listed, of which 10,894 were white, and 5,561 were colored. In 1948, there were 16,926 names listed, of which 11,193 were white, and 5,733 were colored. The tabulation as to the various years will be found in 4 S.Tr. 141, 142. It was found as a fact by the court (R. 307) that prior to 1947, no Negro had served on the grand jury in Pitt County in more than twenty years but that prior to 1947, members of the

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"Under the law of Arkansas a challenge to the panel or motion to quash must be promptly made and it is too late if the jury has been empanelled and sworn. *Brown v. State*, 12 Ark. 623 (See 35 C. J. 372). If no objection was made at the trial, it is too late to urge it for the first time after verdict.

"The right to challenge the panel is a right that may be waived and is waived if not seasonably presented. Such rights, if waived during trial, may not be availed of by attack, in a collateral proceeding. *Bracey v. Zerbst*, 10 Cir., 92 F. 2d 8."

Negro race had been occasionally called and had served apparently on the trial jury.

In the year 1947, all jury boxes of the County were purged, and all names appearing on the jury scrolls were destroyed. A new list of names was prepared from the tax lists and other sources, and nothing appeared on these lists or scrolls which indicated whether they were persons of the white or Negro race. The County Attorney met with the Board of Commissioners and advised the Commissioners that under the rulings of the Supreme Court of the United States and the State Supreme Court, eligible Negroes could not be excluded from the jury list (R. 280; 1 S.Tr. 122, 123).<sup>11</sup> The members of the Board of Commissioners testified as to how they made up the list and the details as to the preparation (1 S.Tr. 112ff; R. 283ff).

In 1945, the General Assembly of the State passed a public-local act which staggered the period of service of members of the grand jury, the system providing that after the first day of July, 1945, a regular grand jury should be chosen and that the first nine members of this grand jury should serve for a term of one year and the second nine members should serve for a term of six months, and thereafter, at the first term of the criminal court after the first days of January and July of each year, there would be chosen nine members of the grand jury to serve for a term of one year (R. 315).

It will thus be seen that although the grand jury which indicted the petitioners did not contain any colored persons,

<sup>11</sup>Sam Underwood, County Attorney, testified (R. 280):

"Q. I wish you would state what you did with the board of commissioners if you met with them, and what advice you gave them with reference to the drawing of the jury in June, 1947, when a new list was made up for the odd year?

A. Well, sir, it was in that year that the effect of the amendment regarding women serving on juries was to be felt. After a conference with your office about the matter of women serving on the juries I met with the commissioners, discussed that phase of it with them and pointed out to them the import of the decision of the Supreme Court of the United States with regard to negroes serving on juries in North Carolina and advised them that they should take every precaution to see that no negro was excluded, since they were going to revise the jury list anyway to go ahead and prepare it absolutely in accordance with the law."



nine names were drawn according to the statute and from a box that contained the names of both white and colored. All names were drawn from the whole panel of jurors by a child under ten years of age as required by the statute (4 S.Tr. 16). It was furthermore found by the court as a fact, and the evidence supports the finding, that members of the Negro race have been drawn for jury duty at practically every term of the Superior Court since the box was purged in July, 1947 (4 S.Tr. 17). A venire of 150 jurors was ordered by the court for the trial of this case for the purpose of supplementing the panel of regular jurors. Of these names drawn, five members were of the Negro race, and out of the total number of persons actually summoned by the Sheriff, two were Negroes, and of these two, one served upon the jury which tried these petitioners (4 S.Tr. 17).

In 1 S.Tr. 72, 73, there will be found a list containing the number of jurors summoned for jury duty from August, 1945, on through the May Term, 1947. The clerk to the Board of Commissioners also appended an affidavit (1 S.Tr. 73) showing the number of Negroes who were drawn for jury duty at each term. It should be carefully noted that there might have been more Negroes drawn at all of these terms, but from his knowledge, not less than the number set forth was drawn.

Both the petitioners and the State offered as witnesses several persons from each race who testified that they had never served on any jury in Pitt County although they were apparently eligible. It will be seen that a great many of these persons were ministers or undertakers, and by reason of their occupation were automatically excused from jury duty by the statute. A copy of the statute appears in the appendix. The testimony as to the white persons who have never served on a jury in the county begins in 1 S.Tr. 74, et seq.

In view of the fact that the jury box was purged in the year of 1947, the Board of Commissioners was advised by the County Attorney that under the rulings of this Court, eligible Negroes could not be excluded and in view of the evidence of the Commissioners, clerk to the Board of Commissioners, and others connected with the jury system. (R. 281-302), we do not think that "purposeful" and "long-continued, unvarying, and wholesale exclusion of Negroes from jury service" (AKINS v. TEXAS, 325 U. S. 398, 89 L. ed. 1692; NORRIS

v. ALABAMA, 294 U. S. 587, 79 L. ed. 1074) has been shown by petitioners. At least, the most that has been shown is that the county authorities administering the jury selection system did not select and put in all of the Negroes that the petitioners, with their idealistic concepts, think should have been selected and put in. The fact remains, that Negroes, since 1947, have begun to serve on the juries in Pitt County.<sup>12</sup> On the trial venire in this case, five Negroes were summoned, but two had died since the names had been put in the jury box in 1947, one had moved out of the county, and two were summoned and reported for duty. One of these disqualified herself by disclosing that she had conscientious scruples against capital punishment. The other one was accepted and served on the trial jury (R. 316, 317). If the rule is still in force (THOMAS v. TEXAS, 212 U. S. 278, 53 L. ed. 512) that great weight will be given to the determination of the trial court, actually present and able to see and hear the witnesses and

<sup>12</sup>On this point, Sheriff Tyson, who attends most of the courts, testified (R. 287):

"Q. You are in court practically every court?

A. Most every court. We have had a few criminal courts when I was sick and been so I didn't attend.

Q. Do members of the negro race serve, drawn and are in court at practically every term of court?

A. Most every term of court there are some.

Q. Are there as many as several on each panel?

A. I don't know what court but I remember one court this year that I have seen as many as four sitting on one case.

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Q. Have you seen negroes sitting in the box on a jury when white defendants were being tried?

A. Yes, sir, I have.

Q. And I ask you if you didn't see that before the Daniels case was tried?

A. Yes, sir, I have.

Q. And since?

A. Yes, sir.

Q. And I ask you whether or not you have seen me as solicitor leave them on the jury?

A. Lots of times.

Q. Court after court?

A. Yes, sir.

Q. And in case after case?

A. Yes, sir, lots of times."

evaluate their truthfulness and deportment, then the careful findings of fact made by the trial judge are correct and should not be disturbed by collateral attack through the instrumentality of Federal habeas corpus.<sup>13</sup> Certainly this matter should be weighed and considered according to the way it appeared before the trial judge. It is grossly unfair to the State court for a case to be presented according to a certain theory by the counsel who then has control of the development of the case and to be passed upon and judged upon that basis, and then after the record is carefully studied by other counsel representing petitioners, and after the county has been searched over for any shred of evidence that would show discrimination, the State trial judge, the prosecuting officer, the jury authorities, and, indeed, the whole county and its officers are tried and condemned by Federal habeas corpus upon entirely new evidence.<sup>14</sup> The district judge, when he reviewed

"In *THOMAS v. TEXAS*, *supra*, on State trials dealing with jury discrimination, this Court thought certain rules should be applied:

"The only contention was that the jury commissioners in the selection of the grand and petit juries who returned the indictment and tried plaintiff in error did in fact exclude therefrom negroes or persons of African descent, because of their race and color. This was a question of fact, and the ordinary rule is that questions of fact will be reviewed by this court on writs of error to state courts.

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"As before remarked, whether such discrimination was practiced in this case was a question of fact, and the determination of that question adversely to plaintiff in error by the trial court and by the Court of Criminal Appeals was decisive, so far as this court is concerned, unless it could be held that these decisions constitute such abuse as amounted to an infraction of the Federal Constitution, which cannot be presumed, and which there is no reason to hold on the record before us. On the contrary, the careful opinion of the Court of Criminal Appeals, setting forth the evidence, justifies the conclusion of that court that the negro race was not intentionally or otherwise discriminated against in the selection of the grand and petit jurors. Indeed, there was a negro juror on the grand jury which indicted plaintiff in error, and there were negroes on the venire from which the jury which tried the case was drawn, although it happened that none of them were drawn out of the jury box."

"The decisions on habeas corpus, as in many other respects, do not give any reasonable degree of certainty as to the scope of the

the action of the trial judge, considered that the trial judge's findings of fact and decision were correct (R. 77, 82, 91, 92). The United States Court of Appeals for the Fourth Circuit disposed of the case (R 323) on principles relating to the scope of Federal habeas corpus in reviewing the action of State courts.<sup>15</sup> In a case like this where one of the issues is racial discrimination in the selection of grand and petit juries, one of the first questions that is always asked pertains to the ratio between the population of the white and colored races in the governmental unit under consideration. The courts have always said, both State and Federal, that fairness in the selection of jurors has never been held to require proportional

evidence on Federal habeas corpus hearing involving action of State courts. In one case (FRANK v. MANGUM, 237 U. S. 309, 59 L. ed. 969), we are told that: "A prisoner in custody pursuant to the final judgment of a state court of criminal jurisdiction may have a judicial inquiry in a court of the United States into the very truth and substance of the causes of his detention, although it may become necessary to look behind and beyond the record of his conviction to a sufficient extent to test the jurisdiction of the state court to proceed to judgment against him." This should be compared with the principle (JOHNSON v. HOY, 227 U. S. 245, 57 L. ed. 497; U. S. v. MULLIGAN, 2 Cir., 67 F. (2d) 321, 323) that the writ of habeas corpus cannot be used to enlarge the record and show additional grounds of defense and further the principle that the writ of habeas corpus cannot be used to amplify the record (KELLY v. RAGEN, 7 Cir., 129 F. (2d) 811, 813) by bringing in newly-discovered evidence.

"It is true that Judge Soper of the Court of Appeals, dissented in this case (R. 334). Judge Soper concluded that in comparison with the ratio of Negro population to white population, the Negroes serving on the jury were too few in number. He compared 44.2% of Negroes over twenty-one years of age with literacy rate of 74.2% with 2% of Negroes on the jury list and less than 1% of the petit jurors consisting of Negroes. However, in the case of U. S. v. BRADY, 133 F. (2d) 476, the service file of jurors in the City of Baltimore consisted of 18,901 white, and 653 colored persons. At the time of the trial, there were seven panels of 25 each in the courts of Baltimore containing eight Negroes out of a total of 175 men. The grand jury had always contained one colored juror. Judge Soper, in writing the opinion of the Court in this case, decided that this ratio was all right and that "no discrimination can be found, even when attention is confined to comparative percentages alone, and the number of Negroes drawn for the juries in Baltimore from the established service list."



representation of races upon any jury. See *AKINS v. TEXAS*, 325 U. S. 389, 89 L. ed. 1692; *VIRGINIA v. RIVES*, 100 U. S. 313, 25 L. ed. 667; *THOMAS v. TEXAS*, 212 U. S. 278, 53 L. ed. 512; *FAY v. NEW YORK*, 332 U. S. 261, 91 L. ed. 2043. Where we constantly find this factor emphasized so that it almost becomes the dominant or major factor in such a consideration, we wonder if the courts have not unconsciously adopted the rule of proportional representation of races on juries in spite of the many judicial utterances to the contrary.<sup>16</sup>

We call the Court's attention to the fact that in *AKINS v. TEXAS*, 325 U. S. 398, 89 L. ed. 1692, the commissioner testified that they had no intention of placing more than one Negro on the panel, and yet this Court found no discrimination in the selection of the jurors.<sup>17</sup>

<sup>16</sup>As an example of a State court (*SWAIN v. STATE*, 215 Ind. 259, 18 N.E. (2d) 921, 926), we find the following: "It is unsafe, we think, to attach too much significance to abstract, mathematical ratios or to the so-called law of recurrences in determining whether there has been arbitrary discrimination in the selection of the juries."

In *FAY v. NEW YORK*, *supra*, the constitutionality of a "blue ribbon" jury in New York was upheld; this jury was apparently selected from a panel of 150 which contained the names of no Negroes. This Court pointed out: "It is fundamental in questioning the composition of a jury that a mere showing that a class was not represented in a particular jury is not enough \* \* \* even in the Negro cases, this Court has never undertaken to say that a want of proportionate representation of groups, which is not proved to be deliberate and intentional, is sufficient to violate the Constitution."

<sup>17</sup>"Commissioner Wells: There was nothing said about the number and nothing was said about the number on the panel. . . . We had no intention of placing more than one negro on the panel. When we did that we had finished with the negro. That was the suggestion of the others and what Judge Adams thought about the selection of the grand jury. . . . Judge Adams did not tell us to put one negro or five negroes on the grand jury. Yes, we just understood to see that negroes had representation on the grand jury, and we went out to see this particular one because we did not know him. . . . Among the white people whose names might go on the grand jury, unless I knew them personally and knew their qualifications, we went out and talked to them. No, we did not discriminate against a white man or a negro. I attempted not to."

In view of the fact that there is also a legal presumption that administrative officials, in preparing a jury panel, will be presumed to perform their duty fairly and justly without discrimination against any race or class (*TARRANCE v. FLORIDA*, 188 U. S. 519, 47 L. ed. 572), we do not think that purposeful and intentional exclusion of colored jurors from the grand and petit jury has been shown in this case.

#### IV.

#### THE CONFESSIONS OF PETITIONERS WERE PROPERLY ADMITTED IN EVIDENCE AND WERE NOT PROCURED IN VIOLATION OF THE FOURTEENTH AMENDMENT.

During the trial in the State court, the State introduced in evidence certain confessions of the petitioners (R. 96-98), and petitioners raised the issue as to whether or not these confessions were obtained by force and coercion contrary to the Fourteenth Amendment. In accordance with the North-Carolina practice, the trial judge excused the jury and conducted a hearing for the purpose of determining whether or not the confessions were voluntary and should be admitted in evidence or excluded.<sup>18</sup> The facts that render a confession involuntary, the admissibility of the evidence to establish such facts and the existence of evidence to support a finding as to admissibility (*STATE v. CROWSON*, 98 N. C. 595, 4 S. E. 143) are questions of law subject to review. The weight of the evidence and the credibility of the witnesses offered to

"Commissioner Tennant: 'We three did not go to see any other negroes, that is the only one. I did not have any intention of putting more than one on the list; I could not think of anybody; I would have if I could have thought of another one, and putting one on.'

"Commissioner Douglas: 'Yes, sir, there were other negroes' names mentioned besides the one we selected; we did not go talk to them; we liked this one, and our intentions were to get just one negro on the grand jury; that is right.'"

<sup>18</sup>That this procedure is in accordance with North Carolina practice, see *STATE v. WHITENER*, 191 N. C. 639, 132 S. E. 603; *STATE v. ROGERS*, 216 N. C. 731, 6 S. E. (2d) 499; *STATE v. DICK*, 60 N. C. 440.

prove or disprove such facts are matters for the trial judge and will not be reviewed. See *STATE v. GRASS*, 223 N. C. 31, 25 S. E. (2d) 193; *STATE v. GOSNELL*, 208 N. C. 401, 181 S. E. 323. If the confession is admitted in evidence, its weight is for the jury (*STATE v. HARDEE*, 83 N. C. 619; *STATE v. HENDERSON*, 180 N. C. 735, 105 S. E. 339), and the jury may believe the confession or not, and the jury is the judge of its sufficiency to prove the fact confessed. The States use different methods to test the voluntariness of a confession (*STATE v. CRANK*, 170 A.L.R. 542, Anno., p. 567), and North Carolina is included in the twelve States that use this same method. If the method used gives opportunity for notice and hearing and other fundamentals of fairness, the State can use its own method of determining the voluntariness of confessions, and no question arises under the due process or the equal protection of the law clause of the Fourteenth Amendment.<sup>10</sup>

The petitioner, Lloyd Ray Daniels, was arrested between 1:00 and 1:30 o'clock in a tenant house on a farm. He was found lying on a bed or cot fully dressed, with his shoes on and all of his clothes except his hat. Blood was found behind his left ear and scratches under his neck and cuts on his hands. There were five officers present with the Sheriff (B. 50) when he was arrested. The officers had proceeded only a short distance when he began to tell about the crime and how it was committed (R. 51), and he was carried in an automobile to Williamston, in Martin County. He was warned by the

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<sup>10</sup>*LISENBA v. CALIFORNIA*, 314 U. S. 219, 86 L. ed. 166:

"Tests are invoked to determine whether the inducement to speak is such that there is a fair risk that the confession is false. These vary in the several States. This court has formulated those which are to govern in trials in the federal courts. The Fourteenth Amendment leaves California free to adopt, by statute or decision, and to enforce such rules as she elects, whether it conform to that applied in the federal or in other state courts."

To the same effect, see *LYONS v. OKLAHOMA*, 322 U. S. 596, 88 L. ed. 1481 and *WARD v. TEXAS*, 316 U. S. 547, 86 L. ed. 1663. The method used in this case for determining the voluntariness or competency of confessions has been the practice in North Carolina for many decades.

Sheriff that anything he said would be used against him.<sup>20</sup> Lloyd Ray Daniels was lodged in jail in Williamston, in Martin County, for safekeeping, and if the Court will examine the evidence in the whole State Transcript, it will be found that he never, at any time, asked to be allowed to see any of his relatives and that he never testified on the State trial that he be allowed to see his mother. For the first time during the hearing on the Federal habeas corpus proceeding, he testified that when he was put in jail in Williamston, he had asked to see his mother and had been refused (R. 144). This was denied by officer Gibbs (R. 246). On the State trial and at the Federal hearing, Lloyd Ray Daniels testified that officer Gibbs told him

Sheriff Tyson testified:

"Q. Did anybody offer him any violence?"

A. No, sir.

Q. Anybody attempt to?

A. No, sir.

Q. Anybody make any threats?

A. No, sir.

Q. Anybody offer him any inducements?

A. No, sir.

Q. State whether or not he was warned or anything said to him with respect to what he said would be used against him?

A. Yes, sir, I warned him and told him he didn't have to make a statement, that any statement he did make would be used against him in court.

Q. When was that?

A. After he got in the car."

S. G. Gibbs, highway patrolman, testified (R. 242, 243, 244, 245):

"Q. Did you talk with Lloyd Ray?

A. Yes, started towards Williamston with him.

Q. You recall whether Sheriff Tyson said anything to him?

A. We started questioning him as to where he was on Saturday night. Sheriff Tyson told him when we started questioning him he didn't have to make any statement, that anything he said could be used against him, or words to that effect.

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Q. It is in evidence in the former trial when the petitioners testified, and at this hearing, that you made certain statements and threats to the petitioner, Lloyd Ray Daniel, had your hand on your pistol and made certain threats to shoot him if he didn't tell what you wanted him to tell, and it is also in evidence that you told him if he wanted to see his mother again, or he would never see his mother again. Tell the Court what you said along those lines?



that he would never see his mother again (R. 138). This was denied by Gibbs and the other officers (R. 248, 261).<sup>21</sup>

Bennie Daniels likewise was arrested and made statements in regard to the murder (R. 230, 231). The officers testified that during his arrest and on the way to Williamston where he was also placed in jail, no one threatened him or used any violence against him. (See Sheriff Tyson's evidence, R. 230,

A. No threats were made to Lloyd Ray concerning the statement. Questioned him on where he was Saturday night and we had some other information and asked him why he sent his mother word to burn his clothes before the cops got them.

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Q. You stated you were in an automobile and didn't strike the petitioner, Lloyd Ray Daniels, or make any threats?

A. No, sir.

Q. Did you put your hand on your pistol?

A. No, sir, I didn't. After we started questioning him he said he might as well go ahead and tell us the truth about it. Then he told us that Saturday night around eight-thirty—

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Q. Anybody strike or slap him or any effort made to intimidate him by force?

A. No, sir.

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Q. Bennie said you and others went upstairs in the jail and that you struck him or knocked him down, knocked him sideways?

A. Best I recall I didn't go to the jail at all when we went back the last time.

Q. Did you at any time while you were down there that night, whether upstairs or down, strike him?

A. No.

Q. Did you threaten him in any way or hold out hope to him that he ought to make a statement, that it might be lighter, or coerce him in any way?

A. No, sir.

All of the officers present when petitioner, Lloyd Ray Daniels, was arrested and who were present when he signed his confession, testified that no coercion or brutality in any form whatsoever was used to procure the confessions (R. 227, 228, 241-272).

<sup>21</sup>Since the decision of this Court in *HARRIS v. SOUTH CAROLINA*, 338 U. S. 68, 69 S. Ct. 1354, petitioners and defendants, trying to avoid the consequences of confessions, have exhibited an undue amount of maternal love. In the *HARRIS* case, the petitioner was not allowed to consult with his family and friends and was interrogated for a long period of time. The sheriff threatened to arrest

231; evidence of Roy Peel, R. 236, 237; evidence of Ray Smith, R. 240, 241, 271; evidence of highway patrolman Gibbs, R. 244, 245; evidence of Captain S. B. Dorsey, R. 250, 251). Bennie Daniels contended on the Federal hearing (R. 150, 151) that Captain L. D. Page had knocked him down in the cell, and when all of the officers present were asked to stand up, he identified Captain Page as the man who knocked him against the cell bars (R. 151). Now let us call the attention of the Court to the fact that when the matter was heard at the State trial, Bennie Daniels could not identify any man present as being the officer who struck him. He specifically said at the State trial that Captain Page did not strike him.<sup>22</sup>

The petitioners signed certain written confessions in the jail at Williamston. The officers testified that no threats, physical violence or inducement or any other methods of coercion were used to obtain these confessions (See R. 273-276 for confessions). About an hour and a half was consumed

the petitioner's mother for handling stolen property, whereupon, the petitioner replied: "Don't get my mother mixed up in it. I will tell the truth," and then made the confession which was held to be invalid. The Court will see in another case which is presently before the Court for argument (BROWN v. ALLEN, No. 620) that this same plan of wanting to see his mother is attempted for the purpose of avoiding a confession he made. Lloyd Ray Daniels did not remember on the State trial that he had asked to see his mother when he was in jail at Williamston, yet a year and a half later on the Federal hearing, so he says, he asked to see his mother when he was in the jail at Williamston. It is plain that petitioners are very willing to cut their evidential cloth to fit the constitutional pattern of cases previously decided by this Court.

<sup>22</sup>Bennie Daniels testified at the State trial as to this episode (R. 261):

"Q. BY THE COURT: Who was in there when you say they slapped you?

A. That fellow sitting yonder.

Q. BY THE COURT: Mr. Gibbs?

A. Yes, sir, and that man sitting yonder.

Q. BY THE COURT: Chief Page?

A. Yes, sir.

Q. BY THE COURT: Was he the one that slapped you?

A. No, sir.

Q. BY THE COURT: They were in there when you were slapped?"

in talking with the petitioners and in writing up the confessions. The testimony of the officers as to the confessions that were written up and signed at the jail will be found as follows: Sheriff Tyson, R. 232, 233, 258; Roy Peel, R. 236, 237; Captain L. D. Page, R. 238, 239, 267, 268, 269; S. G. Gibbs, R. 245, 246, 263, 264; L. E. Manning, R. 248, 249; Oscar Arnold, shorthand reporter, R. 252-254, 270. We cannot quote all of this testimony, but the Court will see that these officers absolutely denied that they used any brutality or any methods of coercion in procuring these confessions, but, to the contrary, the prisoners talked freely and voluntarily. The Court will further see that in many other instances, the petitioners talked about the crime, and it is not even contended by the petitioners that these conversations were attended with any violence and coercion. For example, on R. 233, it will be seen that the Sheriff and officers Dorsey and Manning brought the petitioners from Raleigh to Wilson on the way to Greenville when they were to be tried. The Sheriff took the clothes that the petitioners had on when the murder occurred, and they stopped on the highway, and each one pointed out the clothes he had on at the time, and "both very freely admitted the crime that had been committed. Told us what had happened. Both cried about it." On R. 252, it will be found that when the petitioners were being brought from the State Hospital at Goldsboro to Greenville, officers Dorsey and Manning being in the car, Bennie Daniels said that he was sorry that he killed O'Neal; but Lloyd Ray Daniels had nothing to say about the matter. Other instances could be given.

It is one of the contentions of the petitioners that they were

We find, therefore, that petitioner, Bennie Daniels, could not identify any of the officers present on the State trial as having been the one who struck him, and he specifically said that Captain Page did not strike him. Yet, contrary to all human experience and after the passage of some seventeen months, he identified Captain Page as being the man who struck him. It is plain that petitioners' evidence cannot be relied upon as to any detail, and their testimony is replete with instances where they have contradicted themselves (see cross-examination of Lloyd Ray Daniels, F. Tr. 134ff). At the Federal hearing, Lloyd Ray Daniels testified that the pistol of officer Gibbs was a black color (F. Tr. 145), if the Court will examine his evidence at the State trial, it will find that he testified that the pistol was a nickel or silver color.

unlawfully detained contrary to the criminal procedure and criminal code of North Carolina. The petitioners had, however, been arrested on a felony charge for murder. The Sheriff had told Bennie Daniels' father about the arrest (R. 231). The officers had information that Lloyd Ray Daniels had sent word to his mother to burn his bloody clothes before the officers found them (F.Tr. 262), and upon this basis, the officers had a right to arrest the petitioners without a warrant (G.S. 15-41: Appendix p. 52; see also G.S. 15-42: Appendix p. 53). It is also true that under the North Carolina statute (G. S. 15-47: Appendix p. 53), the State officers are required to permit persons arrested to communicate with counsel and friends immediately, but the petitioners having been arrested on a charge of a capital felony, the provisions of the State statute with reference to bail were not applicable, and as this statute has been construed by the Supreme Court of North Carolina, unless a request is made to communicate with friends and counsel, the statute is not applicable. The officers testified that no request had been made to this effect by the petitioners.<sup>23</sup>

Since the officers who arrested the petitioners deny that there was any coercion or physical violence or that the confessions were extorted in any unconstitutional manner and

<sup>23</sup>In *STATE v. EXUM*, 213 N.C. 16, 195 S. E. 7, G. S. 15-47 was construed in a capital case, and the Supreme Court of North Carolina said:

"The evidence at the trial shows that immediately after his arrest, the defendant was informed by the sheriff that he was charged with the murder of James Williams. This is a capital case. For this reason the provisions of the statute with respect to bail are not applicable to this case.

"There is no evidence in the record tending to show that after his arrest and while he was in the custody of the sheriff the defendant demanded of the sheriff that he be permitted to communicate with friends or with counsel. For this reason the provisions of the statute with respect to the right of a defendant in the custody of an officer and charged with the commission of a crime, to communicate with friends and counsel are not applicable to this case.

"Conceding, however, that the sheriff had violated the provisions of the statute, in the instant case, it would not follow that a voluntary confession made by the defendant to the sheriff would be inadmissible as evidence because of such violation. It is not so provided in the statute."



there is a conflict of testimony, this Court does not consider the question on its merits, and the finding of the State court being supported by substantial evidence is allowed to stand.<sup>24</sup> The mere questioning of a suspect while in the custody of police officers (*GALLEGOS v. NEBRASKA*, No. 94, October Term, 1951; *LYONS v. OKLAHOMA*, 322 U. S. 596, 88 L. ed. 1481) is not prohibited by common law or by the due process clause of the Federal Constitution. We insist, therefore, that under the rulings of this Court, the confessions cannot be disturbed, and no constitutional rights of the petitioners have been violated.

When petitioner, Lloyd Ray Daniels, was at the State Hospital at Goldsboro, he was visited by a white man who had known him for eight or ten years. Petitioner, Lloyd Ray Daniels, told this white man about how they murdered O'Neal. The white man asked G. M. Johnson, a social worker at the Hospital, to sit in on the interview and have Lloyd Ray Daniels repeat what he had already told as to the murder. There certainly was no coercion, threats or physical force used in this interview, and none has ever been shown. It should be pointed out that the State only learned of this confession during the hearing held on the habeas corpus at Tarboro, North Carolina. This confession was, therefore, not used at the trial. This full confession will be found beginning at the bottom of the page at R. 97 and extending through R. 99. We ask the Court to read this confession which is free from attack, and which conclusively shows that these petitioners committed the murder just as they had previously said and related in their former confessions which are under attack in this case.

## V.

### THE INSTRUCTIONS OF THE TRIAL JUDGE TO THE JURY DID NOT DEPRIVE THE PETITIONERS OF ANY CONSTITUTIONAL RIGHTS.

The petitioners quote an excerpt from the instructions of the trial court to the jury in this case dealing with the ques-

<sup>24</sup>*WATTS v. INDIANA*, 338 U. S. 49, 93 L. ed. 1801, 1804.

*LYONS v. OKLAHOMA*, 322 U. S. 596, 88 L. ed. 1481.

*LISENBA v. CALIFORNIA*, 314 U. S. 219, 86 L. ed. 166.

tion of the voluntariness of the confessions (petitioners' brief p.     ); 4 S.Tr. 642). We have already explained that in North Carolina the trial judge, upon a preliminary hearing, in the absence of the jury, determines whether confessions were freely and voluntarily made and should be admitted in evidence or excluded. Having determined that the confessions were admissible, it was the province of the jury to determine what weight, if any, should be given to the confessions, that is, to this sort of evidence. This is the practice which is followed by some eleven or twelve other State jurisdictions of this Nation. If the petitioners are allowed to challenge the conditions upon which the confessions were obtained and are given a fair hearing before the judge with the opportunity to offer witnesses and controvert the position of the State, then we think we have already shown that under the decisions of this Court, the conditions of the due process clause of the Federal Constitution have been met.

Now, it is plain to see that the reasons or underlying causes of the instructions of the court must have been the argument of counsel to the jury that these confessions had been procured under conditions that made them involuntary. In this connection, the court said in the instruction: "*With respect to the statements referred to in the alleged confessions there has been some argument about whether or not they were made freely and voluntarily.*" (Emphasis supplied). The judge, therefore, told the jury that it was the province of the court to determine this question. Naturally, these arguments must have provoked in the jury's mind some uncertainty as to whether the judge would determine that question or whether the jury would determine the question. The Supreme Court of North Carolina has passed on this precise question and has held that in our jurisdiction, these instructions are proper.<sup>25</sup>

<sup>25</sup>In *STATE v. FAIN*, 216 N. C. 157, 4 S. E. (2d) 319, on this identical question, the Supreme Court of North Carolina said:

"The second exception is directed to the court's comment upon the defendant's confession as evidence, namely, 'which the court has held to be competent in this case because it appears that the confession was taken without hope of reward or without any extortion or fear, and that it was fairly taken after the prisoner had been

It should be noted further that the court fully explained to the jury that in all of the evidence, the jury would determine what weight and credibility would be given to the testimony of a witness. Furthermore, in the excerpt of the instructions complained about by the petitioners, the court told the jury, as to the confessions, that he had determined that they had been made freely and voluntarily and were competent in evidence: "But you (the jury) are the sole judges of the weight to be given them and the credit to be given them." The court furthermore instructed the jury (4 S.Tr. 676):

"In arriving at your verdict you should weigh all of the evidence in every way, and in doing so you have the right to take into consideration the interest a witness has in your verdict, if any, their conduct on the witness stand, their demeanor, their interest, or bias, if any, and the means they have of knowing the facts to which they professed to testify, and their character and reputation. You should so weigh their testimony in arriving at a verdict which finds the truth, and not otherwise. It is your province to determine what weight and credibility you will give to the testimony of the witness, or any of them, the weight and reasonableness of it. You may find, if you think proper to do so, that a witness or some of the witnesses, have told the truth about parts of an occurrence and have not told the truth about other parts, or you may find one witness has told the truth about one part of a transaction and that another witness has told the truth about another part of it; and you are not controlled by the greater or smaller number of witnesses testifying one way or the other.

"It is for you to find the facts, giving to the testimony of the witnesses such credit as you think it is entitled to receive; and it is your province to draw such inferences from the testimony as you think it will properly bear in order to aid you in arriving at the facts in the case."

The petitioners cite, in support of their position, the cases of *CHRISTOFFEL v. UNITED STATES*, 338 U. S. 84, 93 L. ed. 1826 and *KONDA v. UNITED STATES*, 7 Cir., 166 F. 91.

duly warned of his rights.' This did not constitute an expression of opinion, such as is prohibited by C. S., 564, for the judge said no more than that the confession had been duly admitted in evidence, and he gave the reasons for admitting it. In this respect, the case of *S. v. DAVIS*, 63 N. C., 578, would seem to be 'straight up and down' with the instant case."

There is nothing in these cases that supports the petitioners' position. The trials in these cases originated in the district courts, they were Federal cases entirely and do not purport to pass upon the instructions of trial judges in State courts when such instructions are brought under review for constitutional reasons. The case of *PALKO v. CONNECTICUT*, 302 U. S. 319, 82 L. ed. 288 dealt with the question of double jeopardy where a State statute permitted the State to appeal in criminal cases. It was held that this was not an infringement of the due process clause of the Fourteenth Amendment. The case did not deal in any aspect with a constitutional review of the instructions of a State trial judge to a jury. The case of *BUCHALTER v. NEW YORK*, 319 U. S. 427, 87 L. ed. 1492 is authority for the respondent's position in this case. The petitioners in the *BUCHALTER* case contended that rulings on evidence and the instructions to the jury precluded a fair trial. The Court of Appeals of New York said some of the rulings and instructions were erroneous, but that they were not substantial and did not affect the ability of the jury to render an impartial verdict. In disposing of the constitutional contention, this Court said:

"As already stated, the due process clause of the Fourteenth Amendment does not enable us to review errors of state law however material under that law. We are unable to find that the rulings and instructions under attack constituted more than errors as to state law."

This Court has held many times that it will not review this type of State action and that no questions are raised under the Fourteenth Amendment.<sup>26</sup> The case of *LYONS v. OKLAHOMA*, 322 U. S. 596, 88 L. ed. 1481 deals with a State practice where the judge determines the voluntary character of the confession as a preliminary matter and then submits the confession to the jury with an instruction that it must be carefully scrutinized and received with great caution by the jury and rejected if obtained by punishment, intimidation or

<sup>26</sup>*DAVIS v. TEXAS*, 139 U. S. 651, 35 L. ed. 300; *HOWARD v. KENTUCKY*, 200 U. S. 164, 50 L. ed. 421; *MILLER v. TEXAS*, 153 U. S. 535, 38 L. ed. 812; *CARTER v. ILLINOIS*, 329 U. S. 173, 91 L. ed. 172; *BUCHALTER v. NEW YORK*, 319 U. S. 427, 87 L. ed. 1492; *SNYDER v. MASSACHUSETTS*, 291 U. S. 97, 78 L. ed. 674; *CHAPLINSKY v. NEW HAMPSHIRE*, 315 U. S. 568, 86 L. ed. 1031.



threats. This is the State practice in Oklahoma, and this Court stated that when the instruction fairly raised the question of whether or not the challenged confession was voluntary, the requirements of due process were satisfied. This Court further stated: "The Fourteenth Amendment does not provide review of mere errors in jury verdicts, even though the error concerns the voluntary character of a confession."

## VI.

THE PETITIONERS, BY THEIR OWN LACHES AND INEPTNESS, HAVING FAILED TO MEET THE CONDITIONS APPLICABLE TO ALL PERSONS UNDER WHICH APPEALS ARE ALLOWED TO THE SUPREME COURT OF NORTH CAROLINA AND HAVING FAILED TO PERFECT THEIR APPEAL, NO CONSTITUTIONAL QUESTION IS PRESENTED AS TO ANY DEPRIVATION OF THE RIGHT TO APPEAL.

On this point, petitioners make the most far-fetched and legally exotic argument of their whole brief. Although the State, not any officer of the State, did anything to hinder the petitioners from perfecting their appeal to the Supreme Court of North Carolina, it is now said that the State of North Carolina has denied the petitioners the right of appeal. Although the conditions upon which an appeal is granted in the State of North Carolina are applicable to all persons, whether white or colored, and although the petitioners failed to meet these conditions, they still say that they should have been allowed an appeal irrespective of their own laches and ineptness in this matter. In other words, it comes to this: the petitioners claim special privileges and discriminations in their favor on this point, they are asking for more than equality.

The statutes of North Carolina regulating appeals (Appendix: pp. 47, 48) fix the number of days for service of case on appeal and counter-case or objections by the prosecution. This time can be enlarged by consent and was done so in this case. The petitioners were allowed (R. 277) sixty days in which to serve their case on appeal, and the State was allowed forty-five days to serve objections or counter-case. This time dated from June 6, 1949. Statement of case on appeal was left in the solicitor's office with his secretary on August 6, 1949, and

counsel for petitioners admitted it was not within the sixty days allowed by the court. The service of the case on appeal by leaving it with the secretary of the prosecuting officer, had it been in time, would have been proper if counsel for the petitioners had secured an officer authorized to serve process to leave the case on appeal at the solicitor's office and make a return (CUMMINGS v. HOFFMAN, 113 N. C. 267, 18 S. E. 170; STATE v. DANIELS, 231 N. C. 17, 56 S. E. (2d) 2). The petitioners' counsel complained that the court reporter had been slow in furnishing him with a copy of the transcript of evidence and that counsel for the petitioners had been subjected to "a great press of business in the courts and elsewhere on other matters."

The petitioners in the meantime had filed an application to the Supreme Court of North Carolina for certiorari, one application being filed on September 27, 1949, and a supplementary application having been filed on October 10, 1949. In the meantime, Judge Williams had heard the matter on the solicitor's motion to strike out the case on appeal and on October 1, 1949, issued an order striking out the appeal (R. 277). In denying the application for certiorari (STATE v. DANIELS, 231 N. C. 17, 56 S. E. (2d) 2), the Supreme Court pointed out that the pressing duties of attorneys in other matters and places was not important but that there was nothing more important and pressing at the time than diligence in perfecting their clients' appeal. The Supreme Court further pointed out that rules requiring service to be made of case on appeal within allotted time are mandatory. Counsel for petitioners on this point imply that this is the first case in which the Supreme Court of North Carolina has denied certiorari in a capital case. The implication, of course, is not correct for certioraris have been denied in such cases in many instances.<sup>27</sup>

<sup>27</sup>STATE v. WESCOTT, 220 N. C. 439, 17 S. E. (2d) 507  
 STATE v. MOORE, 210 N. C. 686, 188 S. E. 421  
 STATE v. CROWDER, 195 N. C. 335, 142 S. E. 222  
 STATE v. BUTNER, 185 N. C. 731, 117 S. E. 783

The first two cases above cited in which certioraris were denied are capital cases involving the sentence of death. In the WESCOTT case, *supra*, the same contention was made that the stenographer's transcript of the evidence had not been obtained. The court pointed

We believe that we could find many more instances of denial in capital cases if time for research were available. The petitioners do not contend, and indeed they could not show, that the Supreme Court of North Carolina grants certioraris for white applicants in capital cases but denies certioraris when they are sought by colored applicants. The Supreme Court of North Carolina has only followed what the petitioners think is a harsh rule, and that is, when a lawyer undertakes to prosecute an appeal to the Supreme Court of North Carolina in a capital case, he should look after that business. The petitioners themselves are to blame for their own situation and fully knowing their own blame and negligence, they undertake to condemn the State of North Carolina by saying that the State has acted in a discriminatory manner. We undertake to say that the counsel first appointed for the petitioners in this case knew how to perfect appeals to the Supreme Court of North Carolina. It was never at any time essential for the petitioners to have a stenographer's transcript of the evidence. Attorneys in North Carolina have made it a constant practice, where the transcript of evidence is not available and time is running short, to state the evidence in the case on appeal from memory and then serve the case on appeal on the prosecuting officer in apt time, and then the case is properly settled when the transcript is available, and in the meantime, the appellant has preserved his rights.

The petitioners cite the cases of *DOWD v. UNITED STATES EX REL. COOK*, 340 U. S. 206, 95 L. ed. 215 and *COCHRAN v. KANSAS*, 316 U. S. 255, 86 L. ed. 1453. These cases do not have the remotest application or relevance to the situation now before the court. Both of these cases deal with situations where the officials and agents of State Penitentiaries retained and prevented appeal papers from leaving the penitentiaries involved and thus prevented the petitioners in question from perfecting their appeals. Of course, if the State or one of its officers interferes and prevents the perfection of an appeal by such unjust and unfair action, then

out that in former times, there were few court reporters, and a stenographer's report of a trial was usually not obtainable in preparing and settling cases on appeal. The court further pointed out: "The stenographer's notes are not the compelling and supreme authority as to what transpired during the trial."

the petitioner in such an action should have his rights presented and passed on. This is in accord with the thinking of any fair-minded person. We submit, therefore, that no constitutional question is raised on this point.

## VII.

PETITIONERS FAILED TO EXHAUST THE AVAILABLE REMEDY OF APPEAL IN THE STATE COURT BY FAILURE TO PERFECT THEIR APPEAL TO THE SUPREME COURT OF THE STATE WHICH COULD HAVE REVIEWED ALL CONSTITUTIONAL ISSUES RAISED BY PETITIONERS IN THEIR TRIAL; THEREFORE, PETITIONERS ARE PROHIBITED BY 28 U.S.C., § 2254 FROM USING THE PROCESS OF A FEDERAL HABEAS CORPUS AS A COLLATERAL ATTACK UPON A JUDGMENT IN A STATE COURT IN A CRIMINAL TRIAL OR AS A SUBSTITUTE FOR AN APPEAL.

We quote 28 U.S.C., § 2254, as follows:

"An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

Petitioners failed to serve statement of case on appeal within the time required by State law, and the trial judge struck out the case on appeal by order after hearing. (See Order, R. 277). See *STATE v. DANIELS*, 231 N. C. 17, 56 S. E. (2d) 2. In North Carolina, petitioners had an unconditioned right (§ 15-180 of the General Statutes) to appeal to the Supreme Court. The Supreme Court of North Carolina reviews constitutional questions relating to racial discrimination in the composition of grand juries and petit juries (*STATE v.*



SPELLER, 229 N. C. 67, 47 S. E. (2d) 537; STATE v. PEOPLES, 131 N. C. 784, 42 S. E. 814), and issues as to the constitutionality of the admission of confessions (STATE v. BROWN, 231 N. C. 152, 56 S. E. (2d) 441; STATE v. BROWN, 233 N. C. 202, 63 S. E. (2d) 99) are passed on by the Supreme Court. For other State cases on jury discrimination and confessions, see appellee's brief C.C.A. 4, No. 6330, p. 10. Petitioners' remedy by appeal was adequate, and petitioners' counsel—who were also counsel for Speller and obtained two new trials in that case—knew how to perfect appeals to the Supreme Court of North Carolina. See STATE v. SPELLER, 229 N. C. 67, 47 S. E. (2d) 537; STATE v. SPELLER, 230 N. C. 345, 53 S. E. (2d) 294.

It is admitted that there have been cases of exceptional circumstances of peculiar urgency (MOORE v. DEMPSEY, 261 U. S. 86, 67 L. ed. 543) where adequate process existed but was ineffective to protect the rights of prisoners. The right of appeal—no matter how adequate and comprehensive the scope of review—would be a legal chimera without the guiding hand of counsel (WILLIAMS v. KAISER, 323 U. S. 471, 89 L. ed 398) to render the appeal effective. None of these exceptions exists in the present case unless the principle is adopted that exceptional circumstances exist justifying the issuance of habeas corpus in all cases of prisoners sentenced to death. We do not believe such a rule exists, but if it does, then such logic approaches the limits of Federal review of all cases where persons are sentenced to death in State courts.

Petitioners contend that "there is presently not available to petitioners any remedy or procedure in the aforesaid state courts," and they are, therefore, entitled to relief in the Federal courts. In other words, any petitioner, where he has available an adequate review upon conditions fixed by the State, can fail to meet these conditions or simply wait until time limitations expire and then say his present status as to exhaustion of remedies must prevail. He need not go to the trouble and expense of an available appeal; all he has to do is to fail to perfect the appeal for any reason.<sup>28</sup> It is true that petitioners were only one day late in serving statement

<sup>28</sup>This view of the matter was discussed in the case of BARTON v. SMITH, 9 Cir., 162 F. (2d) 350, where the Court said:

of case on appeal, but the time element does not answer the question. The State fixes the same appeal procedures for all people of all races, and the fact that petitioners belong to the colored race does not give them preferential treatment in appeals or discriminations in their favor. The time factor in perfecting appeals in nearly all States is a fixed measure and is not governed by approximations or a process of relativity. To adopt the "presently available remedy" theory of counsel for petitioners would completely destroy Title 28, U.S.C., § 2254, and would be an evasion of its plain words.

After this Court denied certiorari (October Term, 1949, No. 412, Misc.), petitioners applied to the Supreme Court of North Carolina for another writ of error coram nobis (*STATE v. DANIELS*, 232 N. C. 196, 59 S. E. (2d) 430) which was dismissed. The petitioners should then have applied to this Court for a certiorari, and this is another instance of failing to exhaust an available remedy. If application had been made to this Court for certiorari, then irrespective of a decision on a non-Federal question—it being then known that coram nobis was not available—this Court would have had an opportunity to say whether or not North Carolina had furnished petitioners sufficient effective process. This fact was noted by the Circuit Court of Appeals (*DANIELS v. ALLEN*, 4 Cir., 192 F. (2d) 763) for the opinion states: "No application for certiorari was made to the Supreme Court of the United States to review this decision" (second coram nobis decision). In a footnote to this opinion (C.C.A. 4), the Court said:

"It (Supreme Court of North Carolina) had before it the fact that the question (jury discrimination) had been raised in this case; for the record shows that the case on appeal which had been stricken by the trial judge was attached to the application made for certiorari to bring it up as a part of the record."

While it is stated in the opinion of the court below (C.C.A. 4) that the question is not one of exhausting State remedies

"It is putting a premium upon negligence and inaction to permit a prisoner to sit idly by and lose his state remedies through lapse of time, and then apply for habeas corpus in a Federal court. An inmate of a state prison can thus force jurisdiction upon a Federal court, by the simple expedient of sleeping on his right to seek the aid of a state forum."

as a prerequisite to the writ, but it is the use of habeas corpus in lieu of an appeal; it is pointed out that to allow such a substitute of an appeal would permit a lower Federal court to review decisions of a State court of coordinate jurisdiction instead of requiring the orderly process of appeal to the Supreme Court of the State with application to the Supreme Court of the United States for certiorari be followed. The right of reviews was provided by State practice and was lost by failure to comply with the reasonable rules of the State court, which cannot be invalidated or waived by the Federal courts.

The petitioners cite and rely upon an article in Harvard Law Review (61 Harvard Law Review 657—The Freedom Writ). As to exhaustion of remedies, we desire to rely upon the same article, and we quote (p. 666):

“‘Exhaustion’ may, however, connote a more extreme requirement than that of no other presently available remedy. It may mean that federal habeas corpus is not to issue unless the petitioner invoked within the proper time every remedy which was ever available to him, even though such untried remedies are no longer available. This application of the exhaustion principle may find justification in the theory that there has been no Fifth or Fourteenth Amendment due process denial when available federal or state processes were not invoked. There are court indications that ‘exhaustion’ has the extreme meaning here suggested. In the *Sunal* case (*Sunal v. Large*, 332 U. S. 174, 91 L. ed. 1982), the court discussion of ‘exceptional circumstances’ indicated that its normal exhaustion rule would not permit federal habeas corpus where appeal had not been sought, though appeal was no longer available.” (Parenthetical matter ours—footnotes not quoted).

It appears that Title 28, U.S.C., § 2254, is but a statutory expression of the rationale of previously decided cases on this subject. Judge Parker who wrote the opinion of the court below, and who also served as Chairman of the Judicial Conference Committee on Habeas Corpus Procedure, in an Article (Limiting the Abuse of Habeas Corpus, 8 F.R.D. 171) states:

“The provisions of the Revised Code with respect to Habeas Corpus are very largely a mere codification of the best practice already worked out by Court decisions.”

Title 28, U.S.C., § 2254, became effective June 25, 1948; the case of *YOUNG v. RAGEN*, 337 U. S. 235, 93 L. ed. 1333, was decided June 6, 1949, and this Court in footnote 1 states:

"Existing law as declared by *Ex Parte Hawk* was made a part of the statute by the new judicial code 28 U.S.C. 1948 ed. Sec. 2254. \* \* \*"

This point—failure to exhaust an adequate appeal—has been already decided against petitioners.

*SUNAL v. LARGE*, 332 U.S. 174, 91 L.ed. 1982

*RIDDLE v. DYCHE*, 262 U.S. 333, 67 L.ed. 1009

*EX PARTE HAWK*, 321 U.S. 114, 88 L.ed. 572

*GLASGOW v. MOYER*, 225 U.S. 420, 56 L.ed. 1147

*WOOLSEY v. BEST*, 299 U.S. 1, 81 L.ed. 3

*YOUNG v. RAGEN*, 337 U.S. 235, 93 L.ed. 1333

*GOTO v. LANE*, 265 U.S. 393, 68 L.ed. 1070

*DARR v. BURFORD*, 339 U.S. 200, 94 L.ed. 761; Anno. 94 L.ed. 785

In the case of *GOTO v. LANE*, 265 U. S. 393, 68 L. ed. 1070, the court had before it an appeal from a judgment of the District Court of Hawaii refusing a writ of habeas corpus sought by thirteen persons convicted in a territorial Circuit Court. They attempted to raise certain constitutional questions about the indictment and other particulars. It appears, however, that the petitioners could have sought a review on a writ of error and could have had these same questions reviewed by an appellate court but that they allowed their time to expire and thereby lost the opportunity to resort to this remedy. In disposing of the question and affirming the dismissal of the habeas corpus, the Supreme Court of the United States said:

"This case does not measure up to that test. The circuit court in which the petitioners were tried and convicted undoubtedly had jurisdiction of the subject matter and of their persons, and the sentence imposed was not in excess of its power. The offense charged was neither colorless nor an impossible one under the law. The construction to be put on the indictment, its sufficiency, and the effect to be given to the stipulation, were all matters the determination of which rested primarily with that court. If it erred in determining them, its judgment was



not, for that reason, void (Ex parte Watkins, 3 Pet. 193, 203, 5 L. ed. 787, 788; Ex parte Yarbrough, 110 U. S. 651, 654, 28 L. ed. 274, 275, 4 Sup. Ct. Rep. 152) but subject to correction in regular course on writ of error. *If the questions presented involved the application of constitutional principles, that alone did not alter the rule.* Markuson v. Boucher, 175 U. S. 184, 44 L. ed. 124, 20 Sup. Ct. Rep. 76. *And if the petitioners permitted the time within which a review on writ of error might be obtained to elapse, and thereby lost the opportunity for such a review, that gave no right to resort to habeas corpus as a substitute.* Riddle v. Dyche, 262 U. S. 333, 67 L. ed. 1009, 43 Sup. Ct. Rep. 555. And see Craig v. Hecht, 263 U. S. 255, ante, 293, 44 Sup. Ct. Rep. 103." (Emphasis supplied)

The case of GOTO v. LANE, *supra*, has been cited and approved various times by the Supreme Court of the United States, the latest reference appearing in the case of SUNAL v. LARGE, 332 U. S. 174, 91 L. ed. 1982. The case is also approved by a Circuit Court of Appeals in the case of BIDDLE v. HAYES, 8 Cir., 8 Fed. (2d) 937. The same case has also been approved in the case of U. S. EX REL. GEISE v. CHAMBERLAIN, 7 Cir., 184 F. (2d) 404 (Adv. Op. No. 4 in Federal Report).

SANDERLIN v. SMYTH, 138 F. (2d) 729, 730 (C.C.A. 4)  
U. S. EX REL. FEELEY v. RAGEN, 166 F. (2d) 976,  
981 (C.C.A. 7)

MARKUSON v. BOUCHER, 175 U. S. 184, 185

Finally, it is contended by petitioners that they attempted to appeal, and, therefore, they have met the conditions of the statute (Title 28, U.S.C., § 2254) and have exhausted their remedy of appeal. There is implicit in this contention a claim of substantial compliance. This is a bizzare and strange contention in view of the language of the statute. The language is written in the past tense "has exhausted," which contemplates completed action. The concept of "exhaustion" is "to bring out or develop completely." The fact remains that the statute does not deal with approximations or attempts. The statute itself is a full answer to such a contention.

We assert that since the enactment of Title 28, U.S.C., § 2254, petitioners have no standing in the Federal courts on habeas corpus unless State appeal is exhausted or unusual circumstances of peculiar urgency are shown.

The cases cited by petitioners as justifying habeas corpus without exhaustion of appellate remedies are either cases that originated in the Federal courts or the court originally had no jurisdiction over the person or subject matter, or exceeded its authority in rendering judgment. Assuming that jury discrimination and the validity of the admission of confessions can be reviewed by Federal habeas corpus, then the question is not one of power but how the power can be exercised. The petitioners' long discussion of the history of habeas corpus does not help us any since the revision and enactment of 28 U.S.C., § 2254. This statutory provision on how Federal habeas corpus can be made effective and the conditions for its use as construed in the cases of *EX PARTE HAWK*, *supra*, and *DARR v. BURFORD*, *supra*, determine the question. Chief Judge Parker, of the Fourth Circuit, who wrote the opinion of the court below (*DANIELS v. ALLEN*, 192 F. (2d) 763), beginning on p. 767, gives the reason why the writ should not have been issued in this case. He quoted from *SANDERLIN v. SMYTH*, 4 Cir., 138 F. (2d) 729 in which it is stated that the writ cannot be used (1) as a substitute for an appeal or writ of error; (2) unless it is made to appear that there is a lack of adequate remedy in the State courts and (3) there must be a gross violation of constitutional rights plus exhaustion of State remedies or no available adequate remedy through lack of State provision or exceptional circumstances. The District Court, in this case, did not make any express findings of fact or conclusions of law on the precise question of whether exceptional circumstances existed. It is submitted that the opinion below in the Fourth Circuit holds that exceptional circumstances do not exist in this case. It seems to us that the present status of Federal review of State action by Federal habeas corpus is that unless the petitioner has exhausted his remedies provided by the State, he is not entitled to review on Federal habeas corpus unless exceptional circumstances exist. The absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner are, but general statutory definitions of the situation, when exceptional circumstances may exist. That this is the correct interpretation of the Federal statute, see *GOODMAN*

v. LAINSON, 8 Cir., 182 F. (2d) 814 and PLAINE v. BURFORD, 10 Cir., 180 F. (2d) 724.

The case of U. S. EX REL. AULD v. WARDEN OF NEW JERSEY STATE PENITENTIARY, 187 F. (2d) 615 is greatly relied upon by petitioners. This case does state that a sentence of death plus the absence of the right to review by habeas corpus in the New Jersey Courts would constitute extraordinary circumstances, and the writer of the opinion further states that there are decisions of this Court to sustain his view, but he does not cite the cases. This discussion is plainly collateral to the primary point in the case because the court disposed of the case on the merits and decided that Auld was not entitled to the writ of habeas corpus. The concurring opinion of Circuit Judge Hastie calls attention to the fact that there was no need of passing upon the problem of extraordinary circumstances.

### VIII.

#### PETITIONERS CANNOT USE HABEAS CORPUS AS A SUBSTITUTE FOR AN APPEAL.

The principle stated above is an old principle, but it is supported by many cases. It is perfectly plain from the record in this case that the petitioners having failed to perfect their appeal are simply trying now to use the writ of habeas corpus as a substitute for the appeal which they could have had but lost through their own negligence. Because constitutional questions are raised in a State court in a criminal trial, this does not, within itself, warrant the review of such questions on habeas corpus. See EURY v. HUFF, 141 F. (2d) 554, 555, C.C.A. 4; GLASGOW v. MOYER, 225 U. S. 420, 56 L. ed. 1147; GRAHAM v. SQUIER, 132 F. (2d) 681, C.C.A. 9.

## CONCLUSION

The record in this case justifies the conclusion that the petitioners murdered their victim in a cruel, horrible and savage manner, and they themselves admit that they committed this murder. Their admission is corroborated by other facts and circumstances. In interpreting the Constitution of the United States, Federal statutes and State laws, and in balancing the rights of the parties, we ask the Court to consider the claims of the victim of this murder.

Respectfully submitted,

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## APPENDIX

## Chapter 1, General Statutes of North Carolina:

§ 1-279. *When appeal taken, stay of execution.*—The appeal must be taken from a judgment rendered out of term within ten days after notice thereof, and from a judgment rendered in term within ten days after its rendition, unless the record shows an appeal taken at the trial, which is sufficient, but execution shall not be suspended until the giving by the appellant of the undertakings hereinafter required.

§ 1-282. *Case on appeal; statement, service, and return.*—The appellant shall cause to be prepared a concise statement of the case, embodying the instructions of the judge as signed by him, if there be an exception thereto, and the request of the counsel of the parties for instructions if there be any exceptions on account of the granting or withholding thereof, and stating separately, in articles numbered, the errors alleged. A copy of this statement shall be served on the respondent within 15 days from the entry of the appeal taken; within 10 days after such service the respondent shall return a copy with his approval or specific amendments indorsed or attached; if the case be approved by the respondent, it shall be filed with the clerk as a part of the record; if not returned with objections within the time prescribed, it shall be deemed approved: Provided, that the judge trying the case shall have the power, in the exercise of his discretion, to enlarge the time in which to serve statement of case on appeal and exceptions thereto or counter statement of case.

§ 1-283. *Settlement of case on appeal.*—If the case on appeal is returned by the respondent with objections as prescribed, the appellant shall immediately request the judge to fix a time and place for settling the case before him. If the appellant delays longer than fifteen days after the respondent serves his counter case, or exceptions, to request the judge to settle the case on appeal, and delays for such period to mail the case and counter case or exceptions to the judge, then the exceptions filed by the respondent shall be allowed; or the counter case served by him shall constitute the case on appeal; but the time may be extended by agreement.

The judge shall forthwith notify the attorneys of the parties to appear before him for that purpose at a certain time and place, within the judicial districts, which time shall not be more than twenty days from the receipt of the request. At the time and place stated, the judge shall settle and sign the case, and deliver a copy to the attorney of each party, or, if the attorneys are not present, file a copy in the office of the clerk of the court. If the judge has left the district before the notice of disagreement, he may settle the case without returning to the district.

In settling the case, the written instructions signed by the judge, and the written request for instructions signed by the counsel, and the written exceptions, are deemed conclusive as to what these instructions, requests, and exceptions were. If a copy of the case settled was delivered to the appellant, he shall within five days thereafter file it with the clerk, and if he fails to do so, the respondent may file his copy.

The judge shall settle the case on appeal within sixty days after the termination of a special term or after the courts of the districts have ended, and if the judge in the meantime has gone out of office, he shall settle the case as if he were still in office. Any judge failing to comply with this section is liable to a penalty of five hundred dollars, for the use of any person who sues for it.

#### Chapter 15, General Statutes of North Carolina:

§ 15-180. *Appeal by defendant to supreme court.*—In all cases of conviction in the superior court for any criminal offense, the defendant shall have the right to appeal, on giving adequate security to abide the sentence, judgment or decree of the supreme court; and the appeal shall be perfected and the case for the supreme court settled, as provided in civil actions.

#### Chapter 9, General Statutes of North Carolina:

§ 9-1. The board of county commissioners for the several counties, at their regular meetings on the first Monday in June in the year 1947, or the jury commissions or such other legally constituted body as may in the respective counties be charged by law with the duty of drawing names of persons for jury service, at the times of their regular meetings, and

every two years thereafter, shall cause their clerks to lay before them the tax returns for the preceding year for their county, and a list of names of persons who do not appear upon the tax lists, who are residents of the county and over twenty-one years of age, from which lists the board of county commissioners or such persons who reside in the county who are of good moral character and have sufficient intelligence to serve as members of grand and petit juries. A list of the names thus selected by the board of county commissioners or such jury commissions shall be made out by the clerk of the board of county commissioners or such jury commissions and shall constitute the jury list of the county and shall be preserved as such.

The clerk of the board of county commissioners or such jury commissions, in making out the list of names to be laid before the board of county commissioners or such jury commissions, may secure said lists from such sources of information as deemed reliable which will provide the names of persons of the county above twenty-one years of age residing within the county qualified for jury duty. There shall be excluded from said lists all those persons who have been convicted of any crime involving moral turpitude or who have been adjudged to be non compos mentis.

§ 9-2. *Names on list put in box.*—The commissioners at their regular meeting on the first Monday in July in the year nineteen hundred and five, and every two years thereafter, shall cause the names on their jury list to be copied on small scrolls of paper of equal size and put into a box procured for that purpose, which must have two divisions marked No. 1 and No. 2, respectively, and two locks, the key of one to be kept by the sheriff of the county, the other by the chairman of the board of commissioners, and the box by the clerk of the board.

§ 9-3. *Manner of drawing panel for term from box.*—At least twenty days before each regular or special term of the superior court, the board of commissioners of the county shall cause to be drawn from the jury box out of the partition marked No. 1, by a child not more than ten years of age, thirty-six scrolls except when the term of court is for the trial of civil cases exclusively, when they need not draw more

than twenty-four scrolls. The persons whose names are inscribed on said scrolls shall serve as jurors at the term of the superior court to be held for the county ensuing such drawing, and for which they are drawn. The scrolls so drawn to make the jury shall be put into the partition marked No. 2. The said commissioners shall at the same time and in the same manner draw the names of eighteen persons who shall be summoned to appear and serve during the second week, and a like number for each succeeding week of the term of said court, unless the judge thereof shall sooner discharge all jurors from further service. The said commissioners may, at the same time and in the same manner, draw the names of eighteen other persons, who shall serve as petit jurors for the week for which they are drawn and summoned. The trial jury which has served during each week shall be discharged by the judge at the close of said week, unless the said jury shall be then actually engaged in the trial of a case, and then they shall not be discharged until the trial is determined.

§ 9-6. *Jurors having suits pending.*—If any of the jurors drawn have a suit pending and at issue in the superior court, the scrolls with their names must be returned into partition No. 1 of the jury box.

§ 9-7. *Disqualified persons drawn.*—If any of the persons drawn to serve as jurors are dead, removed out of the county, or otherwise disqualified to serve as jurors, the scrolls with the names of such persons must be destroyed, and in such cases other persons shall be drawn in their stead.

§ 9-8. *How drawing to continue.*—The drawing out of partition marked No. 1 and putting the scrolls drawn into partition No. 2 shall continue until all the scrolls in partition No. 1 are drawn out, when all the scrolls shall be returned into partition No. 1 and drawn out again as herein directed.

§ 9-19. *Exemptions from jury duty.*—All practicing physicians, licensed druggists, telegraph operators who are in the regular employ of any telegraph company or railroad company, train dispatchers who have the actual handling of either freight or passenger trains, regularly licensed pilots, regular ministers of the gospel, officers or employees of a state hospital for the insane, active members of a fire company, funeral di-



rectors and embalmers, printers and linotype operators, all millers of grist mills, all United States railway postal clerks and rural free delivery mail carriers, locomotive engineers, brakemen and railroad conductors in active service, radio broadcast technicians, announcers, and optometrists, registered or practical nurses in active practice and practicing attorneys at law, and all members of the national guard, North Carolina state guard and members of the civil air patrol, naval militia, officers reserve corps, enlisted reserve corps and the naval reserves, who comply with and perform all duties required of them as members of the national guard, naval militia, officers reserve corps, enlisted reserve corps, and the naval reserves, shall be exempt from service as jurors.

§ 9-24. *How grand jury drawn.*—The judges of the superior court, at the terms of their courts, except those terms which are for the trial of civil cases exclusively, and special terms for which no grand jury has been ordered, shall direct the names of all persons returned as jurors to be written on scrolls of paper and put into a box or hat and drawn out by a child under ten years of age; whereof the first eighteen drawn shall be a grand jury for the court; and the residue shall serve as petit jurors for the court.

§ 9-29. *Special venire to sheriff in capital cases.*—When a judge of the superior court deems it necessary to a fair and impartial trial of any person charged with a capital offense, he may issue to the sheriff of the county in which the trial may be a special writ of venire facias, commanding him to summon such number of persons qualified to act as jurors in said county as the judge may deem sufficient (such number being designated in the writ), to appear on some specific day of the term as jurors of said court; and the sheriff shall forthwith execute the writ and return it to the clerk of the court on the day when it is returnable, with the names of the jurors summoned.

§ 9-30. *Drawn from jury box in court by judge's order.*—When a judge deems a special venire necessary, he may, at his discretion, issue an order to the clerk of the board of commissioners for the county, commanding him to bring into open court forthwith the jury boxes of the county, and he

shall cause the number of scrolls as designated by him to be drawn from box number one by a child under ten years of age. The names so drawn shall constitute the special venire, and the clerk of the superior court shall insert their names in the writ of venire, and deliver the same to the sheriff of the county, and the persons named in the writ and no others shall be summoned by the sheriff. If the special venire is exhausted before the jury is chosen, the judge shall order another special venire until the jury has been chosen. The scrolls containing the names of the persons drawn as jurors from box number one shall, after the jury is chosen, be placed in box number two, and if box number one is exhausted before the jury is chosen, the drawing shall be completed from box number two after the same has been well shaken.

#### Chapter 14, General Statutes of North Carolina:

§ 14-17. *Murder in the first and second degree defined; punishment.*—A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death: Provided, if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the state's prison, and the court shall so instruct the jury. All other kinds of murder shall be deemed murder in the second degree, and shall be punished with imprisonment of not less than two nor more than thirty years in the state's prison.

#### Chapter 15, General Statutes of North Carolina:

§ 15-41. *When officer may arrest without warrant.*—Every sheriff, coroner, constable, officer of police, or other officer, entrusted with the care and preservation of the public peace, who shall know or have reasonable ground to believe that any felony has been committed, or that any dangerous wound has been given, and shall have reasonable ground to believe that any particular person is guilty, and shall apprehend that such person may escape, if not immediately arrested, shall arrest him without warrant, and may summon all bystanders to aid in such arrest.

§ 15-42. *Sheriffs and deputies granted power to arrest felons anywhere in state.*—When a felony is committed in any county in this State, and upon the commission of the felony, the person or persons charged therewith flees or flee the county, the sheriff of the county in which the crime was committed, and/or his bonded deputy or deputies, either with or without process, is hereby given authority to pursue the person or persons so charged, whether in sight or not, and apprehend and arrest him or them anywhere in the State.

§ 15-47. *Arresting officer to inform offender of charge, allow bail except in capital cases, and permit communication with counsel or friends.*—Upon the arrest, detention, or deprivation of the liberties of any person by an officer in this state, with or without warrant, it shall be the duty of the officer making the arrest to immediately inform the person arrested of the charge against him, and it shall further be the duty of the officer making said arrest, except in capital cases, to have bail fixed in a reasonable sum, and the person so arrested shall be permitted to give bail bond; and it shall be the duty of the officer making the arrest to permit the person so arrested to communicate with counsel and friends immediately, and the right of such persons to communicate with counsel and friends shall not be denied.

Any officer who shall violate the provisions of this section shall be guilty of a misdemeanor and shall be fined or imprisoned, or both, in the discretion of the court.

#### Chapter 7, General Statutes of North Carolina:

§ 7-63. *Original jurisdiction.*—The superior court has original jurisdiction of all civil actions whereof exclusive original jurisdiction is not given to some other court; and of all criminal actions in which the punishment may exceed a fine of fifty dollars, or imprisonment for thirty days; and of all such affrays as shall be committed within one mile of the place where, and during the time, such court is being held; and of all offenses whereof exclusive original jurisdiction is given to justices of the peace, if some justice of the peace shall not within twelve months after the commission of the offense proceed to take official cognizance thereof.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 22

RALEIGH SPELLER,

*Petitioner,*

vs.

ROBERT A. ALLEN, WARDEN, CENTRAL PRISON OF THE  
STATE OF NORTH CAROLINA, RALEIGH, NORTH CAROLINA

No. 32

CLYDE BROWN,

*Petitioner,*

vs.

ROBERT A. ALLEN, WARDEN, CENTRAL PRISON OF THE  
STATE OF NORTH CAROLINA, RALEIGH, NORTH CAROLINA

PETITION FOR REHEARING

HERMAN L. TAYLOR,  
*Counsel for Petitioners.*

SAMUEL S. MITCHELL,  
*Of Counsel.*



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## SUBJECT INDEX

### Petition for rehearing

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I. The Court should re-consider its conclusions that the unauthorized employment of an "economic basis" in selecting prospective jurors from the tax scrolls did not result in discrimination based solely on race, that such unauthorized employment of an "economic basis" was not evidence of discrimination in the selection of jurors based solely upon race, and that the unauthorized employment of an "economic basis" in selecting prospective jurors was not challenged by petitioner by his challenge to the petitioner's trial jury, where his challenge was based upon the grounds that there had been discrimination in the preparation of the jury box from whence his jury was drawn, based solely upon race

II. The Court should re-consider its conclusion that the method pursued by the jury commissioners in choosing juries in Forsyth County indicates an abandonment of discrimination against negroes in the constitution of juries in Forsyth County since the decision of this Court in *Brunson et als. v. North Carolina*, rather than a studied and purposeful limitation of negroes on juries in said county as contended by petitioner

III. The Court should re-consider its conclusion that the district court's error in giving weight to this Court's prior denial of certiorari was inconsequential and did not affect its determination that there was no merit in petitioners' applications for the writ of habeas corpus

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SUPREME COURT OF THE UNITED STATES

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*Respondent*

PETITION FOR REHEARING

*To the Honorable the Chief Justice of the United States and  
the Associate Justices of the Supreme Court of the United  
States:*

The petitioners herein pray for a rehearing and a reversal  
of the judgment of this Court dated February 9, 1953, which

affirmed the judgment of the United States Court of Appeals for the Fourth Circuit, which in turn had affirmed the judgment of the United States District Court for the Eastern District of North Carolina. These actions, entitled as above, were prosecuted in this Court *In Forma Pauperis*. These petitions for rehearing are based upon substantial grounds available to petitioners, although not previously presented.

No. 22, *Speller Case*.

I

The Court should re-consider its conclusions that the unauthorized employment of an "Economic Basis" in selecting prospective jurors from the tax scrolls did not result in discrimination based solely on race, that such unauthorized employment of an "Economic Basis" was not evidence of discrimination in the selection of jurors based solely upon race, and that the unauthorized employment of an "Economic Basis" in selecting prospective jurors was not challenged by petitioner by his challenge to the Petitioner's trial jury, where his challenge was based upon the grounds that there had been discrimination in the preparation of the jury box from whence his jury was drawn, based solely upon race.

In the *Speller* case, the petitioner in his brief and argument on the question of discrimination in the selection of jurors in Vance County, North Carolina, from whence his trial jury was drawn, did not separately and specifically treat the question of the unauthorized use of an "economic basis" in the selection of taxpayers for jury service in Vance County. Nor did the respondent separately and specifically treat this matter, in its brief and argument to this Court or in any other Court. But, rather, the petitioner has consistently from the United States District Court



through this Court treated the uncontradicted evidence by the Clerk of the Vance County Board of County Commissioners that he had taken the "names of the people who had right much real estate" (R. pp. 36, 37, 49, 51), as indication of how discrimination based solely upon race had resulted and as uncontradicted evidence of such discrimination and had taken all as being included and encompassed in his challenge to the jury panel on the grounds of racial discrimination in the selection of taxpayers for jury service. It is here pointed out that because of the view held by both the District Court and the Court of Appeals, namely, that the Writ of *Habeas Corpus* was not available to petitioner, whose conviction had been upheld by the Supreme Court of North Carolina following his appeal from his trial in Superior Court of Bertie County, North Carolina, and where his petition to this Court to review to North Carolina Supreme Court's decision on Writ of Certiorari had been denied, the District Court and of the Court of Appeals have not touched upon or considered this matter. Indeed, this unauthorized "economic basis" employed in composing the jury box from whence came petitioner's trial jury was not admitted and shown to have been employed until the United States District Court held hearing on petitioner's application for Writ of *Habeas Corpus*, the Clerk of the Vance County Board of Commissioners not having admitted this unauthorized procedure in the proceedings before the state courts. Hence the matter was not included in the state trial Judge's findings of fact which were adopted by the United States District Court (R. pp. 102 and 110) as its findings of fact. And as above mentioned, the United States Court of Appeals, because of its view of the law concerning the availability of the Writ of *Habeas Corpus*, never reached the merits of the issue (R. p. 153 to 156) of whether there had been unconstitutional discrimination based solely on race in the selection of jurors.

Petitioner respectfully submits to the Court that the employment of economic factors in selecting jurors, not sanctioned by state law, is within the prohibition of the Fourteenth Amendment when, as in this case, it does lead to discrimination against petitioner's race and must, as petitioner contends, invariably lead to such discrimination. That the Majority of Courts recognize that the "requirement of comparative wealth" effected discrimination against petitioner and his race can be seen from the Majority Opinion where it is stated: "If the requirement of comparative wealth is eliminated, and the statutory standards employed, the number would increase to the equality justified by their moral and educational qualification for jury service as compared with the white race." To the same effect is the statement in the Majority Opinion: "The action of the Commissioners' Clerk, however, in selecting those with 'the most property,' an economic basis not attacked here, might well account for the few Negroes appearing in the box." And these quoted statements, as do other statements in the Majority Opinion, indicate the majority's conviction that selection of jurors based upon "requirements of comparative wealth" must always result in discrimination against a Negro accused and his race. This Court has never before sanctioned a jury selection plan which in its very nature must lead to discrimination against a Negro accused, regardless of how well meaning were the intentions of the jury commissioners or jury officials. *Cassell v. State of Texas*, 339 U. S. 282; *Hill v. State of Texas*, 316 U. S. 400; and *Smith v. State of Texas*, 311 U. S. 128. And the Court has previously adhered to the policy of looking at the substance of the jury plan rather than its form to determine if there is unconstitutional discrimination *Caswell v. State of Texas*, *supra*, and *Smith v. State of Texas*, *supra*. Since, as petitioner herein point out, the employment of an economic

basis for selection of jurors was a mere vehicle by which unconstitutional discrimination was effected and petitioner contends that the issue was included in petitioner's challenge to the jury on the ground that there had been discrimination in the preparation of the jury box, petitioner has made out an uncontroverted case.

Moreover, the Majority of the Court concedes that the use of economic factors in the selection of jurors has no sanction in the laws of North Carolina and was an "innovation" introduced by the Clerk of the Vance County Board of Commissioners. While the petitioner in his brief and argument did not separately and specifically treat this phase of the case, as above explained, when this unauthorized and illegal procedure is laid beside the fact that previous to 1949 there had been discrimination in the selection of jurors in Vance County, as is recognized by the Majority of the Court; that the Clerk of the Board had served the boards in Vance County for 18 years in the matter of assisting with the preparation of the jury lists (R. p. 40) and gave no evidence of repentance; that the record is silent of any change of policy on the part of jury officials during 1949 as to inclusion of Negro jurors, attesting to a continuation of the same policy followed previous to 1949 (R. pp. 40, 50, 64, 67, 74, 77, 79); and the fact that only 7% of the names in the jury box were names of Negroes this unauthorized and illegal use of economic factors takes on a different hue than that of a mere irregularity, and it is seen as a part of a general picture of racial discrimination in the selection of jurors. In petitioner's brief and argument he did not treat these "economic factors" separate from the whole picture or attempt to show the interplay of "economic factors" with other phases of the entire picture. Nevertheless, the Opinion of the Court gives these economic factors a separate and distinct treatment and greater weight.

In a case decided by the Supreme Court of North Carolina since the decision of this Court in the instant cases (*State v. Mack Ingram*, 237 N. C. 197, — S. E. (2d) —, reversed on other grounds), the North Carolina Supreme Court, in treating a contention of the defendant that he had been denied equal protection of the laws in his trial in the Superior Court of Caswell County through discrimination against members of his race, to wit, Negroes, in the constitution of juries in said County, said:

“In view of our conclusion that the motion for judgment of nonsuit should have been allowed, we do not reach the question raised by the defendant’s appeal, whether there was any evidence to support the finding by the trial judge that there had been no intentional or systematic exclusion of negroes from jury service in Caswell County. *Akins v. Texas*, 325 U. S. 398.

“But we deem it proper to call attention to the testimony tending to show that the Board of County Commissioners of Caswell County had not observed the statute in making up the jury lists of the County. The Chairman of the Board testified that in selecting jurors to serve in the Superior Court the custom prevailed of getting from the election registration books the names of prospective jurors and putting them in the box, and that from the lists thus obtained the requisite number of names were drawn to serve as jurors at each term of court. The statute G. S. 9-1 provides that the Board of County Commissioners shall biennially cause their Clerk to lay before them the tax returns of the preceding year from which they shall select the names of all such persons as have paid their taxes and are of good moral character and of sufficient intelligence to serve on juries. This statute was amended by Chap. 1007 Public Laws of 1947 to add the further provision that the commissioners shall cause their Clerk to lay before them also a list of names of persons resident and twenty-one years of age who do not appear on the tax returns from which the commissioners shall select the names of those of good



moral character and sufficient intelligence. It is further provided in the Act that the Clerk, in making out the lists from such reliable sources of information as will provide the names of those qualified for jury duty.

"In *State v. Brown*, 233 N. C. 202, 63 S. E. 2d 99, Chief Justice Stacy interpreted this statute as follows: 'Prior to 1947 it was provided by G. S. 9-1 that the tax

returns of the preceding year for the county should constitute the source from which the jury list should be drawn, and this was then the only prescribed source.

To meet the constitutional change of the previous election making women eligible to serve on juries, the statute was amended in 1947 enlarging the source to include not only the tax returns of the preceding year but also 'a list of names of persons who do not appear upon the tax lists, who are residents of the county and over twenty-one years of age,' to be prepared in each county by the Clerk of the Board of Commissioners.'

"Said Justice Walker in *State v. Mallard*, 184 N. C. 667 (674), 114 S. E. 17: 'It is not for the commissioners, or others selected to perform public duties, to substitute for the methods chosen by the Legislature those of their own as being more desirable and better adapted to accomplish the end in view.' And as expressed by Justice Brogden in *Hinton v. Hinton*, 196 N. C. 341, 145 S. E. 615: 'It is clear, therefore, that the law not only guarantees the right of trial by jury, but also the right of trial by a proper jury; that is to say, a jury possessing the qualifications contemplated by law.'

The Court should re-consider its conclusion that the method pursued by the jury commissioners in choosing juries in Forsyth County indicates an Abandonment of discrimination against negroes in the constitution of juries in Forsyth County since the decision of this Court in *Brunson et als. v. North Carolina*, rather than a studied and purposeful limitation of Negroes on juries in said county as contended by petitioner.

In the *Brown* case, petitioner in his brief and argument did not present the issue of discrimination against Negroes in the constitution of juries in Forsyth County in the manner in which the Majority Opinion of the Court indicates is expedient and necessary, namely, that by means of uncontradicted evidence petitioner made out a *prima facie* case, thereupon shifting the burden of rebutting such case upon the Respondent, which case, petitioner submits, is not rebutted by the record. It cannot be denied that as of the *Brunson*, *Jones*, *Janes*, *King* and *Watkins* cases (333 U. S. 851), this Court found as a fact that discrimination had been practiced against Negroes by the jury commissioners of Forsyth County in the constitution of juries in said county. The record in the instant case shows that since the decision of this Court in the abovenamed cases, said jury commissioners have, if at all, altered their practices in this respect only as a matter of degree, that is, have undertaken what they deem to be compliance with the edict of this Court in said cases by putting a few Negroes on grand and petit juries here and there, a token compliance and under circumstances which indisputably show a policy of limiting Negroes on juries in Forsyth County (R. pp. 38-39, 42-44). This Court had occasion to consider the identical situation in the

cases *Hill v. Texas*, 316 U. S. 400 and *Cassell v. Texas*, 339 U. S. 282, both involving Dallas County, Texas. In between the *Hill* case and the *Cassell* case, the jury commissioners of Dallas County, in either a good faith or bad faith attempt to comply with the edict of this Court in the *Hill* case, resorted to including the name of only one Negro on the list of grand jurors drawn for said County. This Court in the *Cassell* case held that such a situation did not indicate a change to a constitutional method of selecting juries, but, on the other hand, disclosed the continuation of an unconstitutional method of so doing, and petitioner contends that the same situation exists in his case, that by means of evidence uncontroverted in the record, he has disclosed a practice on the part of jury commissioners in Forsyth County of limiting the number of Negroes on juries in said county since the *Brunson* and companion cases, thus making out a *prima facie* case of discrimination, that the burden of rebutting such case then shifted to the Respondent, and that the Respondent failed to carry that burden by showing that the consistent presence of only a few Negroes on juries in said county was due to other than racial reasons.

Further, petitioner has not heretofore argued to the Court that the alleged 1949 purge of the jury box of Forsyth County has any necessary significance on the issue of whether or not there has been any change of practice on the part of the jury commissioners of said county. Under the laws of North Carolina (G. S. 9-1), all counties are required to purge their jury box every two years, in the odd years, and this is required without regard to presence or absence of any issue of discrimination in the selection of juries. Thus, the purge of a jury box in any given instance may be presumed to be done in compliance with statutory requirement, rather than be interpreted as an effort on the part of the commissioners to alter some course of prior unconstitutional administration.

of their duties. In such circumstances, it would appear to be hardly possible to attribute the position of Negroes with respect to Forsyth County juries in either the pre-*Brunson* or post-*Brunson* drawings of juries entirely to chance or accident.

Nos. 22 and 32, *Speller* and *Brown* cases.

### III

The Court should re-consider its conclusion that the District Court's error in giving weight to this Court's prior denial of certiorari was inconsequential and did not affect its determination that there was no merit in petitioners' applications for the writ of habeas corpus.

Petitioner did not discuss or consider in their brief and argument what influence the District Court's giving weight to denial of certiorari by this Court had on said Court's determination of petitioners' cases on the merits, nor the legal propriety of said court's action in this respect. It cannot be doubted on the record in these cases that the District Court's opinion as to the effect of the denial of certiorari by this Court was of paramount, if not controlling, importance in his decision in said case.

In the *Speller* case, as heretofore pointed out, the issue of the use of "economic factors" in the selection of juries in Vance County was first discovered during the habeas corpus hearing in the District Court. Nevertheless, the District Court adopted the state trial court's findings of fact which included no such evidence on or consideration of the economic basis used in jury selections in said county. It is respectfully submitted that had the weight which the District Court gave to this Court's denial of certiorari not affected the District Court's determination on the merits, that he would have made his own findings



of fact or at least made some mention to the use of the "economic basis." It is observed that the "economic basis" is the *sine quo non* of the conclusion reached in the Majority Opinion that there has been no racial discrimination in Vance County jury selection affecting petitioner.

Similarly, in the *Brown* case, the summary manner in which the District Court dismissed petitioner's petition for writ of habeas corpus, as well as the opinion of the Court, indicates that said Court was led in its determination by its views on the effect of the denial of certiorari.

### Conclusion

It is respectfully prayed that these Petitions for Rehearing be granted and that upon such rehearing the judgments of this court herein be reversed.

Respectfully submitted,

RALEIGH SPELLER,  
CLYDE BROWN,

*Petitioners.*

HERMAN L. TAYLOR,  
*Counsel for Petitioners.*

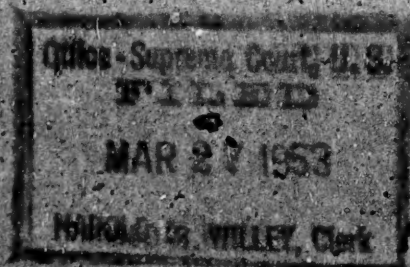
SAMUEL S. MITCHELL,  
*Of Counsel.*

### Certificate

Counsel for Petitioners certify that these petitions for rehearing are presented in good faith and not for delay, and that the petitions are restricted to the grounds above specified.

HERMAN L. TAYLOR,  
*Counsel for Petitioners.*

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**OCTOBER TERM, 1952**

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**No. 20**

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**BENNIE DANIELS AND LLOYD RAY DANIELS,**  
*Petitioners,*

*vs.*

**ROBERT A. ALLEN, WARDEN, CENTRAL PRISON OF THE**  
**STATE OF NORTH CAROLINA, RALEIGH, NORTH CAROLINA**

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**PETITION FOR REHEARING**

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

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BENNIE DANIELS AND LLOYD RAY DANIELS,

vs.

*Petitioners,*

ROBERT A. ALLEN, WARDEN, CENTRAL PRISON OF THE  
STATE OF NORTH CAROLINA, RALEIGH, NORTH CAROLINA

**PETITION FOR REHEARING**

*To the Honorable The Chief Justice of the United States  
and the Associate Justices of the Supreme Court of the  
United States:*

The petitioners herein pray for a rehearing and reversal of the decision of this Court dated February 9, 1953 (— U. S. —), affirming the judgment of the Court of Appeals for the Fourth Circuit which affirmed the judgment of the District Court for the Eastern District of North Carolina denying the application of petitioners for writs of habeas corpus challenging their imprisonment by the State of North Carolina under judgments of death. This petition for rehearing is based upon substantial grounds available to the petitioners although not previously presented.

It will be recalled that in this cause petitioners, convicted and sentenced to death by the State of North Carolina, were denied any review of the substantial federal constitutional questions raised by that conviction, by appeal or otherwise, in North Carolina because their then counsel served the statement of the case on appeal as required by local practice one day late; and this Court has held that that delay also bars any review by federal habeas corpus.

In the majority opinion it was acknowledged that "this Court will review state habeas corpus proceedings even though no appeal was taken, if the state treated habeas corpus as permissible. Federal habeas corpus is available following our refusal to review such state habeas corpus proceedings." For these propositions the majority cited *Hawk v. Olson*, 326 U. S. 271, 278; *Herndon v. Lowry*, 801 U. S. 242, 247; and *Smith v. Baldi*, — U. S. —. Accordingly, it would appear that if any alternative remedy made available by the state is exhausted, then, notwithstanding a failure to appeal, the prerequisites established by 28 U. S. C. A. § 2254 are met. *Wade v. Mayo*, 334 U. S. 672.

Petitioners have previously suggested that they have exhausted remedies other than direct appeal made available by North Carolina and that therefore the alleged failure to appeal was immaterial. See Petitioners' Brief, p. 94. This aspect of petitioners' argument was neither noted nor commented upon by the majority opinion, although that opinion did discuss in detail the various proceedings in the courts of the State of North Carolina carried forward by the petitioners when confronted with the contention that they had failed properly to exhaust their appeal. See also Petitioners' Brief, pp. 6-9, 50-51. We respectfully submit that this suggestion by petitioners, which was only briefly made, almost as in passing, should now be further considered by the



Court, particularly in view of the circumstance that the majority opinion recognizes that the exhaustion of an alternative remedy is a sufficient basis for the satisfaction of § 2254.

We understand, of course, that the alternative remedies here exhausted may not afford the full measure of review which would be available if North Carolina had a habeas corpus proceeding similar in scope and nature to federal habeas corpus. But we submit that it would be ironical and paradoxical to deny federal habeas corpus on the ground that the alternative relief exhausted where there has been a failure to appeal affords a narrow rather than a broad area of review. Certainly the fact that the state makes possible only limited review after failure to appeal should be an inducement rather than a deterrent to review by federal habeas corpus.

Finally in this connection we observe that in several instances the majority opinion suggests that the North Carolina Supreme Court, in disposing of the appeal and the various efforts of petitioners to obtain review by that court, looked into and passed upon the merits of the appeal. These suggestions by the majority opinion would appear to mitigate the severity of denying *any* appellate review of the fundamental federal constitutional errors committed in the convictions of the petitioners resulting in judgments of death. But the stark injustice of the situation in which the petitioners find themselves cannot thus be averted. If there has been a review of the merits by the North Carolina Supreme Court in passing upon the appeal, then it cannot fairly be said that the petitioners have failed to exhaust their remedy of appeal for purposes of federal habeas corpus; and if there has not been such a review on the merits then the fact must be faced and it must be understood that petitioners are being required to go to their

deaths without having once had the benefit of an appellate inquiry into the constitutional propriety of the procedures whereby they were convicted.

## II

The majority opinion discussed the one-day delay in the serving of the case on appeal by counsel for petitioners and considered that delay to be fatal to the institution of federal habeas corpus proceeding without commenting upon the sufficiency of the cause or reason which had been asserted for that delay. Apparently the question considered was whether the 60-day period allowed for the serving of the case on appeal was adequate and in accord with constitutional requirements and, concluding that it was so, the majority found that the failure to comply with the 60-day period was an absolute bar to any further relief irrespective of how gross the constitutional error committed in these capital cases.

In other analogous circumstances this Court did not thus evaluate the failure to comply with similar state requirements of time. *Patterson v. Alabama*, 294 U. S. 600; *Moore v. Dempsey*, 261 U. S. 86. But quite apart from whether, in general, the failure to comply with state time requirements may be deemed fatal in a capital case where as here the delay is not jurisdictional in nature, in this case the petitioners have and have asserted adequate cause for the delay.

The particular circumstances of this case require that the sufficiency of the cause for the delay be independently considered and passed for purposes of federal habeas corpus and not merely considered with a view to ascertaining whether the Supreme Court of North Carolina violated the Fourteenth Amendment in denying the appeal. For here the determination to deny the appeal by the North Carolina Supreme Court was based on state grounds and review by this Court by certiorari would be unavailable

(*White v. Ragen*, 324 U. S. 760, 765; *House v. Mayo*, 324 U. S. 42, 48); and no alternative state remedy may be available to petitioners to be exhausted as a predicate to federal habeas corpus jurisdiction. Accordingly, here the alleged failure to appeal operates to cause a *total* exclusion of federal review. State action reaching such a result should be independently reviewed and appraised by the appropriate federal tribunal, and not merely for purposes of constitutionality, but as well to determine, for purposes of federal jurisdiction, whether the action of the litigant is such as to warrant the complete deprivation of access to the federal courts. This is a federal question to be passed upon independently by federal courts. Upon rehearing we seek review of the facts set out previously. (Petitioners' Brief, opp. 5-6, 34-36) on the basis of the foregoing criterion; on such review we think the only possible conclusion is that petitioners were entitled to the exercise of federal habeas corpus jurisdiction.

### Conclusion

It is respectfully prayed that this petition for rehearing be granted and upon rehearing that the order of this Court affirming the judgment of the Court of Appeals for the Fourth Circuit denying the applications of petitioners for writs of habeas corpus be reversed and that such applications be granted.

Respectfully submitted,

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**Certificate**

Counsel for petitioners certifies that this petition for rehearing is presented in good faith and not for delay, and that the petition is restricted to the grounds above specified.

O. JOHN ROGGE

(7292)